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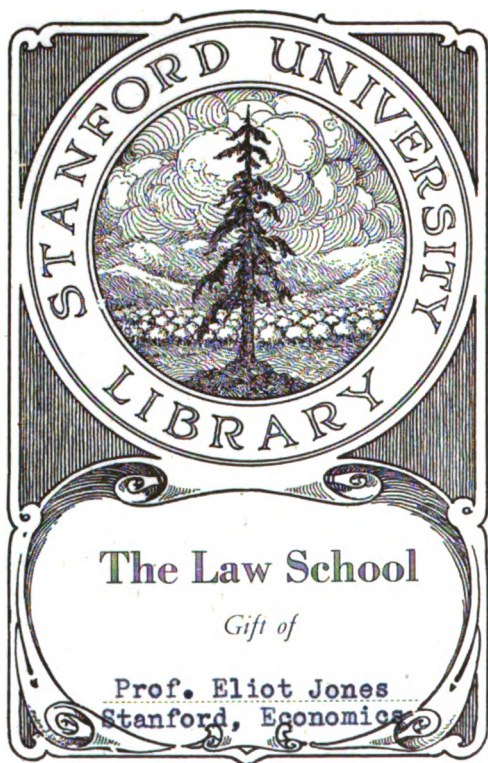
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Ecot. Cases

August 29, 1922

FEDERAL ANTI-TRUST DECISIONS

CASES DECIDED IN UNITED STATES COURTS

ARISING UNDER, INVOLVING, OR GROWING
OUT OF THE ENFORCEMENT OF

THE FEDERAL ANTI-TRUST ACTS

(Act of July 2, 1890; 26 Stat., 209)

(Act of Aug. 27, 1894; 28 Stat., 570)

(Act of Feb. 12, 1913; 37 Stat., 667)

(Act of Oct. 15, 1914; 38 Stat., 730)

INCLUDING A FEW SOMEWHAT SIMILAR DECISIONS
NOT BASED UPON THOSE ACTS

1890-1917

L.C. Baugh

COMPILED BY

JOHN L. LOTT

AND

ROGER SHALE

UNDER THE DIRECTION OF THE ATTORNEY GENERAL

VOL. 4

WASHINGTON
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1917

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FEDERAL ANTI-TRUST DECISIONS.

VOL. 4.
1910-1912.

Syllabus.

[373] DR. MILES MEDICAL COMPANY, v. JOHN D.
PARK & SONS COMPANY.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT.

No. 72. Argued January 4, 5, 1911.—Decided April 2, 1911.

[220 U. S., 373.]

An actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break the contract to the injury of the other, and in the absence of an adequate remedy at law equitable relief will be granted; but *held*, in this case, that plaintiffs were not entitled to relief as the contract under which they claimed was invalid.^b

A system of contracts between manufacturers and wholesale and retail merchants by which the manufacturers attempt to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail whether purchasers or sub-purchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to

* For opinion of Circuit Court of Appeals, Sixth Circuit (164 Fed. Rep., 806), see vol. 2, p. 470.

^b Syllabus and statements of arguments copyrighted 1911, by The Banks Law Publishing Company.

Statement of the Case.

restraint of trade and is invalid both at common law, and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act of July 2, 1890; and so held as to the contracts involved in this case.

Such agreements are not excepted from the general rule and rendered valid because they relate to proprietary medicines manufactured under a secret process but not under letters patent; nor is a manufacturer entitled to control prices on all sales of his own products in restraint of trade.

The rights enjoyed by a patentee are derived from statutory grant under authority conferred by the Constitution, and are the reward received in exchange for advantages derived by the public after the period of protection has expired; and the rights of one not disclosing his secret process so as to secure a patent are outside of the policy of the patent laws, and must be determined by the legal principles applicable to the ownership of such process.

The protection of an unpatented process of manufacture does not necessarily apply to the sale of articles manufactured under the process.

A manufacturer of unpatented proprietary medicines stands on the same footing as to right to control the sale of his product as the manufacturers of other articles, and the fact that the article may [§74] have curative properties does not justify restrictions which are unlawful as to articles designed for other purposes.

A manufacturer of unpatented articles cannot, by rule or notice, in absence of statutory right, fix prices for future sales, even though the restriction be known to purchasers. Whatever rights the manufacturer may have in that respect must be by agreements that are lawful.

Although the earlier common-law doctrine in regard to restraint of trade has been substantially modified, the public interest is still the first consideration; to sustain the restraint it must be reasonable as to the public and parties and limited to what is reasonably necessary, under the circumstances, for the covenantee; otherwise restraints are void as against public policy.

Agreements or combinations between dealers, having for their sole purpose the destruction of competition and fixing of prices, are injurious to the public interest and void; nor are they saved by advantages which the participants expect to derive from the enhanced price to the consumer.

164 Fed. Rep. 908, affirmed.

This is a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Sixth Circuit which affirmed a judgment of the Circuit Court dismissing, on de-

Statement of the Case.

murrer, the bill of complaint for want of equity. 164 Fed. Rep. 803; 90 C. C. A. 579.

The complainant Dr. Miles Medical Company, an Indiana corporation, is engaged in the manufacture and sale of proprietary medicines, prepared by means of secret methods and formulas and identified by distinctive packages, labels and trade-marks. It has established an extensive trade throughout the United States and in certain foreign countries. It has been its practice to sell its medicines to jobbers and wholesale druggists who in turn sell to retail druggists for sale to the consumer. In the case of each remedy, it has fixed not only the price of its own sales to jobbers and wholesale dealers, but also the wholesale and retail prices. The bill alleged that most of its sales were made through retail druggists and that the demand for its remedies largely depended upon their [375] good will and commendation, and their ability to realize a fair profit; that certain retail establishments, particularly those known as department stores, had inaugurated a "cut-rate" or "cut-price" system which had caused "much confusion, trouble and damage" to the complainant's business and "injuriously affected the reputation" and "depleted the sales" of its remedies; that this injury resulted "from the fact that the majority of retail druggists as a rule cannot, or believe that they cannot realize sufficient profits" by the sale of the medicines "at the cut-prices announced by the cut-rate and department stores," and therefore are "unwilling to, and do not keep" the medicines "in stock" or "if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at 'cut' or 'reduced' price from the established price suffers loss of reputation and becomes of inferior value and demand."

It was further alleged that for the purpose of protecting "its trade sales and business" and of conserving "its good will and reputation" the complainant had established a method "of governing, regulating and controlling the sale

Statement of the Case.

and marketing" of its remedies, which is thus described in the bill:

"Contracts in writing were required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines and cures, of the following tenor and effect:

"CONSIGNMENT CONTRACT—WHOLESALE.

"*The Dr. Miles Medical Company.*

"This agreement made by and between The Dr. Miles Medical Company, a corporation, of Elkhart, Indiana, hereafter referred to as the proprietor, and ——— hereinafter referred to as the consignee, witnesseth:

"That the said proprietor hereby appoints said con[§76]signee one of its wholesale distributing agents, and agrees to consign to such consignee for sale for the account of said proprietor such goods of its manufacture as the proprietor may deem necessary, the title thereto and property therein to be and remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancellation of this agreement. Said goods to be invoiced to consignee at the following prices:

"Medicines, of which the retail price is \$1; \$3 per dozen.

"Medicines (if any) of which the retail price is 50 cents; \$4 per dozen.

"Medicines, of which the retail price is 25 cents; \$2 per dozen.

"Freight on all orders, the invoice price of which amounts to \$100 or more, to be prepaid by the proprietor; otherwise, freight to be paid by consignee.

"Said consignee agrees to confine the sale of all goods and products of the said proprietor strictly to and to sell only to the designated retail agents of said proprietor as specified in lists of such retail agents furnished by said proprietor and alterable at the will of said proprietor, and to faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation for all services, charges and disbursements a commission of 10 per cent of the invoice value, and a further commission of 5 per cent on the net amount of each consignment, after deducting the said 10 per cent commission, on all advances on account remitted within ten days from date of any consignment, it being agreed between the parties hereto that such advances shall in no manner affect the title to such goods, which title shall remain in the proprietor as if no such advances had been made; provided that such advances [§77] shall be repaid to said consignee should the said proprietor terminate this agreement and the return of any unsold goods on which advances have been made. Said consignee guarantees the payment for all goods

Statement of the Case.

sold under this agreement and agrees to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding. Failure to make such accounting and remittance within ten days from the first of each month shall render the whole account payable and subject to draft, but the proceeds of such draft shall not affect the title of any unsold goods, which shall remain in the proprietor until actually sold, as herein provided.

"It is further agreed that the consignee shall furnish the proprietor from time to time upon demand full statements of the stock of goods of the proprietor on hand on any date specified and that a failure to furnish such statements within ten days from date of such demand shall be a sufficient cause for the cancellation of this agreement, and a demand for the return of the consigned goods.

"It is further agreed that the proprietor will cause each retail package of its goods to be identified by a number and said consignee hereby agrees to furnish the said proprietor full reports upon proper cards or blanks furnished by said proprietor of the disposition of each dozen or fraction of such goods by means of the identifying numbers, specifying the names and addresses of the retail agents to whom such goods have been delivered and the dates of such delivery, and to send such reports to said proprietor at least semi-monthly, and at any other time on the request of said proprietor.

"It is understood and agreed between the parties hereto that the commissions herein specified shall not be considered as earned by said consignee upon any goods of said proprietor which shall have been delivered to dealers not authorized agents of said proprietor, as per list of [\$78] such agents, or upon any goods whose disposition by said consignee shall not have been properly reported as herein provided, or sold at prices less than the prices authorized, and that said consignee shall not credit any such commissions when making remittances on consignment account provided notice has been given by said proprietor that such commissions are unearned; and that if such unearned commissions have been deducted by said consignee in making advance payments or monthly remittances on account they shall be charged back to said consignee and credited and paid to said proprietor. It is understood that violation or nonobservance of any provision hereof by the consignee shall make this agreement terminable and all unsold goods returnable at the option of the proprietor.

"It is agreed that the goods of said proprietor shall be sold by said consignee only to the said retail or wholesale agents of said proprietor, as per list furnished, at not less than the following prices, to-wit:

"Medicines, of which the retail price is \$1; \$8 per dozen.

"Medicines (if any) of which the retail price is 50 cents; \$4 per dozen.

"Medicines, of which the retail price is 25 cents; \$2 per dozen.

"Provided, that said consignee may allow a cash discount not exceeding 1 per cent, if paid within ten days from date of invoice, and

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that when sales at one time and at one invoice, amount to \$15 or more, the said consignee may allow 3 per cent trade discount, and if said purchase amounts to \$50 or more, 5 per cent trade discount, all without cost to the proprietor, and if such \$50 quantity shall be shipped direct to the retail purchaser from the laboratory of said proprietor, on the order from said wholesale distributing agent, freight will be prepaid by the proprietor, but not otherwise.

[379] "This contract will take effect when the original, duly signed by the consignee, has been received and accepted by The Dr. Miles Medical Company, at Elkhart, Indiana.

"Done under our hands — —, A. D. 1907.

"Fill in date on above line.

"THE DR. MILES MEDICAL COMPANY.

"—— —, *Wholesale Dealer.*

"Sign your name on above line.

"Original. Return in enclosed envelope."

And written contracts were required with all retailers of your orator's said proprietary remedies, medicines and cures, as follows:

"RETAIL AGENCY CONTRACT.

"The Dr. Miles Medical Company.

"This agreement between The Dr. Miles Medical Company of Elkhart, Indiana, and — — — —, of — — — — Retailer's name on above line. Town. State. Hereinafter referred to as retail agent, witnesseth:

"APPOINTED AGENT.

"The said Dr. Miles Medical Company hereby appoints said retail dealer as one of the retail distributing agents of its proprietary medicines and agrees that said retail agent may purchase the proprietary medicines manufactured by said Dr. Miles Medical Company (each retail package of which the said company will cause to be identified by a number) at the following prices, to wit:

"WHOLESALE PRICES.

"Medicines, of which the retail price is \$1; \$8 per dozen.

"Medicines, of which the retail price is 50 cents; \$4 per dozen.

"Medicines, of which the retail price is 25 cents; \$2 per dozen.

"QUANTITY DISCOUNT.

"Provided that when purchases at one time and on one invoice amount to \$15 (or more), wholesale distributing agents are authorized to allow 3 per cent trade discount; if such purchase amounts to \$50 (or more) 5 per cent trade discount will be allowed, and if such \$50 quantity be shipped direct to the purchaser from the

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laboratory of said Dr. Miles Medical Company for the account of such wholesale agent, freight will be prepaid, but not otherwise.

"FULL PRICE.

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company.

"VIOLATION.

"It is further agreed between the parties hereto that the giving of any article of value, or the making of any concession by means of trading stamps, cash register coupons, or otherwise, for the purpose of reducing the price above agreed upon shall be considered a violation of this agreement, and further it is agreed between the parties hereto that the Dr. Miles Medical Company will sustain damage in the sum of twenty-five dollars (\$25) for each violation of any provision of this agreement, it being otherwise impossible to fix the measure of damage.

"This contract will take effect when a duplicate thereof, duly signed by the retail agent, has been received and approved by The Dr. Miles Company, at its office at Elkhart, Indiana.

"Done under our hands — —, A. D. 1907.

"Fill in date on above line.

"THE DR. MILES MEDICAL COMPANY.

" — — —, Retail Dealer.

"Sign your name on above line in ink.

[§81] "To retail dealer:

"Paste printed label, giving name and address, that your name may be correctly listed.

"Duplicate. Keep for reference."

As an aid to the maintenance of the prices thus fixed the company devised a system for tracing and identifying, through serial numbers and cards, each wholesale and retail package of its products.

It was alleged that all wholesale and retail druggists, "and all dealers in proprietary medicines," had been given full opportunity, without discrimination, to sign contracts in the form stated, and that such contracts were in force between the complainant "and over four hundred jobbers and

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wholesalers and twenty-five thousand retail dealers in proprietary medicines in the United States."

The defendant is a Kentucky corporation conducting a wholesale drug business. The bill alleged that the defendant had formerly dealt with the complainant and had full knowledge of all the facts relating to the trade in its medicines; that it had been requested, and refused, to enter into the wholesale contract required by the complainant; that in the city of Cincinnati, Ohio, where the defendant conducted a wholesale drug store, there were a large number of wholesale and retail druggists who had made contracts, of the sort described, with the complainant, and kept its medicines on sale pursuant to the agreed terms and conditions. It was charged that the defendant, "in combination and conspiracy with a number of wholesale and retail dealers in drugs and proprietary medicines, who have not entered into said wholesale and retail contracts" required by the complainant's system and solely for the purpose of selling the remedies to dealers "to be advertised, sold and marketed at cut-rates," and "to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit" from the [\$82] sales of the remedies, had unlawfully and fraudulently procured them from the complainant's "wholesale and retail agents" by means "of false and fraudulent representations and statements, and by surreptitious and dishonest methods, and by persuading and inducing, directly and indirectly," a violation of their contracts.

It is further charged that the defendant, having procured the remedies in this manner, had advertised and sold them at less than the jobbing and retail prices established by the complainant; and that for the purpose of concealing the source of supply the identifying serial numbers, which had been stamped upon the labels and cartons, had been obliterated by the defendant or by those acting in collusion with the defendant, and the labels and cartons had been mutilated thus rendering the list of ailments and directions for use illegible, and that the remedies in this condition were sold both to the wholesale and retail dealers and ultimately to buyers for use at cut rates.

Argument for Petitioner.

The bill prayed for an injunction restraining the defendant from inducing or attempting to induce any party to any of the said "wholesale or retail agency contracts" to "violate or break the same, or to sell or deliver to the defendant, or to any person for it" the complainant's remedies; from procuring or attempting to procure in any way any of these remedies from wholesale or retail dealers who had executed the contracts; from advertising, selling or offering for sale the remedies obtained by any of the described means at less "than the established retail price thereof" or to dealers who had not entered into contract with the complainant; from in any way obliterating, mutilating, removing or covering up the labels and cartons upon the bottles containing the remedies and from making sales without such labels and cartons, and the letter press and numerals thereon, being intact. There was also a prayer for an accounting.

[883] The defendant demurred to the bill generally for want of equity and also specially to that portion of the bill which related to the mutilation and destruction of the identifying numbers and labels.

The Circuit Court sustained the demurrers and dismissed the bill and its judgment was affirmed by the Circuit Court of Appeals.

Mr. Frank F. Reed, with whom *Mr. Edward S. Rogers* was on the brief, for petitioner:

The wholesale contracts are agency contracts and not contracts of sale.

Under each contract between petitioner and wholesale dealers the remedies are in terms and in fact consigned to such wholesaler as a distributing agent. The wholesaler is designated as, and is actually made, an agent. Hence, each sale to a retailer is a sale by petitioner through its agent. The arrangement between petitioner and each wholesaler is clearly one of bailment and not of sale or conditional sale. *Milburn Co. v. Peak*, 89 Texas, 209; 34 S. W. Rep. 102; *Willcox & Gibbs Co. v. Ewing*, 141 U. S. 627; *York Mfg. Co. v. Cassell*, 201 U. S. 344; *Metropolitan Bank v. Benedict Co.*, 74 Fed. Rep. 182; *Atlas Glass Co. v. Ball Bros. Co.*, 87

Argument for Petitioner.

Fed. Rep. 418; *Re Galt*, 120 Fed. Rep. 64; *Re Flanders*, 134 Fed. Rep. 560; *Briggs v. Foster*, 187 Fed. Rep. 778; *In re Fabian*, 151 Fed. Rep. 949; *In re McGehee*, 166 Fed. Rep. 928; *Franklin v. Stoughton Wagon Co.*, 168 Fed. Rep. 857; *Corbitt Buggy Co. v. Ricard*, 169 Fed. Rep. 935; *Walter A. Wood Co. v. Vanstory*, 171 Fed. Rep. 875; *Butler Bros. Co. v. Rubber Co.*, 156 Fed. Rep. 1; *McCullough v. Porter*, 4 W. & S. (Pa.), 177; *Watch Case Co. v. Fourth St. Bank*, 194 Pa. St. 535; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60; *First National Bank v. Schwaben, Exr.*, 127 Illinois, 578; *Hunter v. Gordon*, 33 Ill. App. 464; *Lens v. Harrison*, 148 Illinois, 598; *Bayliss v. Davis*, 47 Iowa, 340; *Norton v. Melick*, 97 Iowa, 564; [384] 66 N. W. Rep. 780; *Eldridge v. Benson*, 61 Massachusetts, 483; *Hatch v. McBrien*, 88 Michigan, 159; 47 N. W. Rep. 214; *Olney v. Van Housen*, 8 Thomp. & C. 318; *Elwell v. Coon* (N. J.), 46 Atl. Rep. 580; *Lambeth Rope Co. v. Brigham*, 170 Massachusetts, 518; *Monitor Mfg. Co. v. Jones*, 96 Wisconsin, 619; *Reaper Co. v. Raynor*, 38 Wisconsin, 119; *Burton v. Goodspeed*, 69 Illinois, 287; *Walker v. Butterick*, 105 Massachusetts, 287; *Cordage Co. v. Sims*, 44 Nebraska, 148; 62 N. W. Rep. 514; *Sturm v. Boker*, 150 U. S. 312; *Balderston v. National Rubber Co.*, 18 R. I. 338; 27 Atl. Rep. 507; *Barnes Safe Co. v. Tobacco Co.*, 38 W. Va. 158; 18 S. E. Rep. 482; *National Bank v. Goodyear*, 90 Georgia, 711; 16 S. E. Rep. 962; *Moline Plow Co. v. Rodgers*, 53 Kansas, 743; 37 Pac. Rep. 111; *Fleet v. Hertz*, 201 Illinois, 594; *Re Columbus Buggy Co.*, 143 Fed. Rep. 859; *Re Smith & Nixon Piano Co.*, 149 Fed. Rep. 111. *Hartman v. J. D. Parke Co.*, 145 Fed. Rep. 358; 153 Fed. Rep. 24; *Wells v. Abraham*, 146 Fed. Rep. 190; *Dr. Miles M. Co. v. Jayne Drug Co.*, 149 Fed. Rep. 888, were sales to jobbers and resale by the jobber to the retailer and distinguished from this case.

Petitioner may lawfully, through wholesale agents, impose terms and conditions upon retail buyers as to price and sale. There is no restraint of trade in agency contracts, whatever restrictions may be imposed upon the agent.

The principal controls the agent. *Rice v. Brook*, 20 Fed. Rep. 611, 613; *Weed v. Adams*, 37 Connecticut, 378, 380; *Barksdale v. Brown*, 1 Nott & McC. 517, 519; *Scott v. Rogers*,

Argument for Petitioner.

Abb. Dec. 157, 159; *Field v. Farrington*, 10 Wall. 141, 149; *Brown v. McGran*, 14 Pet. 479; *Cotton v. Hiller*, 52 Mississippi, 7, 13; *Union Hardware Co. v. Plume & Atwood Co.*, 58 Connecticut, 219; *Welsh v. Wind Mill Co.*, 89 Texas, 653; *Weisboldt v. Standard Fashion Co.*, 80 Ill. App. 67; *W. A. Wood Co. v. Greenwood Hardware Co.*, 75 S. Car. 378; *Keith v. Optical Co.*, 48 Arkansas, [885] 138; *Roller v. Ott*, 14 Kansas, 609; *Newell v. Meyendorff*, 9 Montana, 254; *Payne v. Railway Co.*, 81 Tennessee, 507; *Whitwell v. Tobacco Co.*, 125 Fed. Rep. 454, 461; *Arkansas Brokerage Co. v. Dunn & Powell Co.*, 173 Fed. Rep. 899; *Robison v. Texas Pine Land Assn.*, 40 S. W. Rep. 843; *Hunt v. Simonds*, 19 Missouri, 583, 586; *Butterick Co. v. Rose*, 141 Wisconsin, 533; 124 N. W. Rep. 647; *Butterick Co. v. Fisher*, 203 Massachusetts, 122; 89 N. E. Rep. 189.

Any manufacturer or dealer may sell or refuse to sell at pleasure, and may fix prices, terms and conditions arbitrarily, either personally, or through an agent, when a sale is made; and provisions of the wholesale contract forbidding sales except to accredited retail dealers and except at fixed prices are no more in restraint of trade than the refusal of any trader to deal with anyone except on his own terms would be, or the refusal to sell except at his own price or to deal with persons who, for any reason or for no reason, may be objectionable. *Payne v. Railway Co.*, 81 Tennessee, 507; *Whitwell v. Tobacco Co.*, 125 Fed. Rep. 454; *C., C., C. & St. L. Ry. Co. v. Jenkins*, 174 Illinois, 398; *Live Stock Com. Co. v. Live Stock Exchange*, 143 Illinois, 210; *Tanenbaum v. N. Y. Fire Ins. Exch.*, 68 N. Y. Supp. 342; *Collins v. Am. News Co.*, 69 N. Y. Supp. 638; *Hunt v. Simons*, 19 Missouri, 583, 586; *Schulten v. Bavarian Brewing Co.*, 96 Kentucky, 224; *Baker v. Ins. Co. (Ky.)*, 64 S. W. Rep. 913; *McCune v. Norwich Gas Co.*, 30 Connecticut, 521, 524; *N. Y. C. & St. L. Ry. Co. v. Schaffer*, 65 Oh. St. 414; *Brewster v. Miller*, 101 Kentucky, 368; *Anderson v. United States*, 171 U. S. 604; *Matthews v. Associated Press*, 136 N. Y. 333; 32 N. E. Rep. 981; *Star Publishing Co. v. Associated Press*, 159 Missouri, 410; *People v. Klaw*, 106 N. Y. Supp. 341, 347; *Union Pacific Coal Co. v. United States*, 173 Fed. Rep. 737.

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Petitioner's system is legal, and not in restraint of [336] trade. Petitioner manufactures medicines under secret formulas which are its exclusive property. The medicines themselves embody trade secrets.

Contracts giving the exclusive right to sell the product of a maker in a certain territory are valid. Cases *supra* and *Roller v. Ott*, 14 Kansas, 609; *Newell v. Myendorff*, 9 Montana, 254; 23 Pac. Rep. 333; *Olmstead v. Distilling Co.*, 77 Fed. Rep. 265; *In re Greene*, 52 Fed. 104; *Ferris v. American Brew. Co.*, 155 Indiana, 539; 58 N. E. Rep. 701; *Woods v. Hart*, 50 Nebraska, 497; *Ward v. Hagan*, 11 Abb. N. S. 478; *Palmer v. Stebbins*, 3 Pick. 168; *Anheuser-Busch Assn. v. Houch*, 27 S. W. Rep. 692; *Fugua v. Pabst Brew. Co.*, 36 S. W. Rep. 479; *Houch v. Wright*, 77 Mississippi, 476; *Vandeweghe v. American Brew. Co.*, 61 S. W. Rep. 526; *Gates v. Hooper*, 90 Texas, 563; *Norton v. Thomas*, 99 Texas, 578; *Clark v. Wine Fence Co.*, 22 Tex. Civ. App. 41.

Contracts for exclusive dealing in articles are valid. *Cable News Co. v. Stone*, 15 N. Y. Supp. 2; *Whitwell v. Continental Tob. Co.*, 125 Fed. Rep. 454; *Brown v. Roundsvell*, 78 Illinois, 589; *Clark v. Crosby*, 37 Vermont, 188; *Shade Roller Co. v. Cushman*, 143 Massachusetts, 353; *Blauwer v. Williams Co.*, 36 Mississippi, 173; *Photographic Co. v. Grocery Co.*, 108 S. W. Rep. 768.

Contracts restricting the distribution or use of property are legal. *Phillips v. Iola Cement Co.*, 125 Fed. Rep. 593; *Meyer v. Estes*, 164 Massachusetts, 457; *Crystal Ice Co. v. Brewing Assn.*, 8 Tex. Civ. App. 1; *Bancroft v. Embassing Co.*, 72 N. H. 402; *Twomey v. People's Ice Co.*, 66 California, 223; *Schwalen v. Holmes*, 49 California, 665; *Hodge v. Sloan*, 107 N. Y. 244; *Kellogg v. Larkin*, 3 Chandler (Wis.), 138; *Lanyon v. Garden City Sand Co.*, 223 Illinois, 616; *Leslie v. Lorillard*, 110 N. Y. 519.

Contracts for the entire output of a plant are valid. *Carter-Crume Co. v. Peyrrung*, 86 Fed. Rep. 439; *Heimbuecher v. Goff Co.*, 119 Ill. App. 373; *Over v. Foundry Co.*, [387] 37 Ind App. 452; *Van Marter v. Babcock*, 23 Barb. 633; *Hadden v. Dimmick*, 31 How. Pr. 196.

Restrictions on prices are valid. *Clark v. Frank*, 17 Mo. App. 602; *Commonwealth v. Grinstead*, 111 Kentucky, 203;

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Ellman v. Carrington (1901), 2 Ch. 275; 84 L. T. (N. S.) 868; *Walsh v. Dwight*, 58 N. Y. Supp. 91; *Rakemann v. Riverbank Imp. Co.*, 167 Massachusetts, 1; *Weidoldt v. Standard Fashion Co.*, 80 Ill. App. 67.

Trade secrets and articles embodying them are property monopolies and contracts relating thereto not within the restraint of trade rule.

This absolute dominion over and monopoly in inventions, discoveries and writings is the foundation of the patent and copyright laws and has been so declared in a long series of cases. *Press Publishing Co. v. Monroe*, 78 Fed. Rep. 196; *Holmes v. Hurst*, 174 U. S. 82; *Millar v. Taylor*, 4 Burr. 2308; *Jeffreys v. Boosey*, 4 H. L. C. 920; *Duke of Queensbury v. Shebbare*, 2 Eden, 329; *Prince Albert v. Strange*, 1 MacN. & G. 25; *S. C.*, 18 L. J. Ch. 120; *Bartlette v. Oritenden*, 4 McLean, 800; *Abernethy v. Hutchinson*, 3 L. J. (O. S.) 209; *Donaldson v. Beckett*, 2 Br. Par. Cas. 129; *Pope v. Curl*, 2 Atk. 342; *Caird v. Sims*, L. R. 12 App. C. 826; *Palmer v. DeWitt*, 47 N. Y. 582; *Thompkins v. Halleck*, 186 Massachusetts, 82.

To control the sale and prices of his own product by a manufacturer is valid and lawful when the article is made and sold under letters patent or copyright. *Patent cases: Bement v. National Harrow Co.*, 186 U. S. 70; *National Phonograph Co., Ltd., v. Edison Bell Co.* (1907), L. R. 1 Ch. 335; 98 L. T. R. 291; *Consolidated Seeded Raisin Co. v. Griffin*, 126 Fed. Rep. 864; *Button Co. v. Eureka Specialty Co.*, 77 Fed. Rep. 288; *Phonograph Co. v. Kaufmann*, 105 Fed. Rep. 960; *Phonograph Co. v. Pike*, 116 Fed. Rep. 863; *Cortelyou v. Lowe*, 111 Fed. Rep. 1005; *Dickerson v. Matheson*, 57 Fed. Rep. 524; *Bonsack Machine Co. v. Smith*, 70 Fed. Rep. 883; *Bowling v. Taylor*, 40 [388] Fed. Rep. 404; *Dickerson v. Tinting*, 84 Fed. Rep. 192; *Butterick Co. v. Rose*, 141 Wisconsin, 533; *Shade Roller Co. v. Oushman*, 143 Massachusetts, 353; 9 N. E. Rep. 629; *Glue Co. v. Russia Cement Co.*, 154 Massachusetts, 92; *Good v. Cordage Co.*, 121 N. Y. 1; *Machine Co. v. Morse*, 103 Massachusetts, 73; *Cortelyou v. Johnson*, 138 Fed. Rep. 110; *Bancroft v. Union Embossing Co.*, 72 N. H. 402; *Hulse v. Bonsack Machine Co.*,

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65 Fed. Rep. 864; *Victor Co. v. The Fair*, 123 Fed. Rep. 424; *Phonograph Co. v. Schlegel*, 128 Fed. Rep. 733; *Whitson v. Columbia Co.*, 18 App. D. C. 525; *Rubber Tire Co. v. Rubber Works*, 142 Fed. Rep. 531; 154 Fed. Rep. 358; *Indiana Mfg. Co. v. Case Co.*, 154 Fed. Rep. 365. *Copyright cases*: *Straus v. Am. Pub. Assn.*, 177 N. Y. 473; *Murphy v. Press Assn.*, 56 N. Y. Supp. 597; *Newspaper Assn. v. O'Gorman Co.*, 147 Fed. Rep. 616; *Straus v. Am. Pub. Assn.*, 194 N. Y. 538.

The methods of manufacture and the articles made under trade secrets, when the article, as here, is itself a secret article with its ingredients and their proportions unknown and undisclosed by the article as sold and inspection thereof, are both property and legal monopolies. Until either voluntary disclosure to, or lawful discovery by, the public of the secret or process they are and continue to be protected as monopolies. *Powell v. Vinegar Co.*, 13 R. P. C. 235; 66 L. J., Ch. Div. 763; (1896) 2 Ch. 69; 14 R. P. C. 720, 728; (1897) A. C. 710; *Peabody v. Norfolk*, 98 Massachusetts, 452; *Stewart v. Hook*, 118 Georgia, 445; *Tabor v. Hoffman*, 118 N. Y. 30; *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110; *Simmons Co. v. Waibel*, 1 So. Dak. 488; *National Tube Co. v. Eastern Tube Co.*, 13 O. Cir. Dec. 469, 471; *Board of Trade v. Christie Co.*, 198 U. S. 236; *Board of Trade v. Cella*, 145 Fed. Rep. 28; *Stone v. Goss* (N. J.), 55 Atl. Rep. 736; *Thum v. Tloczynski*, 114 Michigan, 149; *Westervelt v. National Paper Co.*, 154 Indiana, 673; *Salomon v. [389] Hertz*, 40 N. J. Eq. 400; *S. C.*, 2 Atl. Rep. 379; *Grand Rapids Wood Co. v. Hatt*, 152 Michigan, 132; *Extracting Co. v. Keystone Co.*, 176 Fed. Rep. 830; *Sanitas Nut Food Co. v. Cemer*, 134 Michigan, 370; *Detinning Co. v. Am. Can Co.*, 67 N. J. Eq. 243; *Taylor Iron & Steel Co. v. Nichols*, 70 N. J. Eq. 541; *National Gum Co. v. Braendly*, 51 N. Y. Supp. 93; *Harvey Co. v. Drug Co.*, 77 N. Y. Supp. 674; *Pressed Steel Car Co. v. Standard Steel Car Co.*, 210 Pa. St. 464; *Eastern Extracting Co. v. Greater N. Y. Ex. Co.*, 110 N. Y. Supp. 738; *Union Switch & Signal Co. v. Sperry*, 169 Fed. Rep. 926; *Wiggins Sons Co. v. Cott-A-Lap Co.*, 169 Fed. Rep. 150.

Argument for Respondent.

Mr. Alton B. Parker, with whom *Mr. William J. Shroder* was on the brief, for respondent:

The legal effect of the contracts between petitioner and wholesale drug dealers and jobbers is that of a contract of sale. *The Peoria Mfg. Co. v. Lyons*, 153 Illinois, 427; *Howell Son & Co. v. Boudor Tr. et al.*, 95 Virginia, 815; *Conn v. Chambers*, 123 App. Div. (N. Y.) 298, aff'd, 195 N. Y. 538; *Foder v. Howarth*, 57 Nebraska, 150; *Mack v. Tobacco Co.*, 48 Nebraska, 397; *Powder Co. v. Hilderbrand*, 187 Indiana, 462; *Gondre & Co. v. Kean*, 28 N. Y. Supp. 7; *Arbuckle Bros. v. Kirkpatrick & Co.*, 98 Tennessee, 221; *Arbuckle Bros. v. Gates & Brown*, 95 Virginia, 802; *Williams v. Tobacco Co.*, 21 Tex. Civ. App. 635; *Snelling v. Arbuckle Bros.*, 104 Georgia, 362; *Norwegian Plow Co. v. Clark*, 102 Iowa, 31; *De Krusif v. Flieman*, 130 Michigan, 12.

The contract is not one of agency. The petitioner has no peculiar, special or exclusive right in the articles manufactured by it, warranting it to carry out, with reference to their sale, a plan or scheme which would otherwise be invalid and illegal. *Mercantile Agency v. Jewelers' Pub. Co.*, 155 N. Y. 241; *Larroue v. O'Loughlin*, 88 Fed. Rep. 896.

[890] The attempt of the petitioner in this case is manifestly not only to acquire, without taking out a patent, rights which are only given under the patent and copyright laws, but to do that without complying with the condition on which alone such right can be obtained under such laws, to-wit: the abandonment of the right after a fixed period of time. It is an attempt to maintain a scheme to give it for an unlimited period of time, or for all time to come, a right which the courts have uniformly held can only be obtained for a limited period of time under the patent and copyright laws. Such a scheme is, in the absence of special right, illegal and unlawful. *Wheaton v. Peters*, 8 Pet. 591; *Bement v. Harrow Company*, 186 U. S. 70; *Edison v. Kaufman*, 105 Fed. Rep. 960; *Edison v. Pike*, 116 Fed. Rep. 863; *Victor Talking Machine Co. v. The Gram*, 123 Fed. Rep. 424; *Park v. N. W. D. A.*, 175 N. Y. 1; *Strauss v. Am. Publishers' Assn.*, 171 N. Y. 473; *Gamewell v. Crane*, 160 Massachusetts, 50; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 California, 510; *Tacktonius v. Scott*, 110 Wisconsin, 441; *Pastour Vaccine Co.*

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v. Burkey, 22 Tex. Civ. Apps. 281; *Flow Pressed Steel Co. v. Schoen*, 77 Fed. Rep. 29; *Walsh v. Dwight*, 40 App. Div. 518; *Elliman v. Garrington* (1901), 2 Chan. 276; *Heaton & Co. v. Eureka Specialty Co.*, 77 Fed. Rep. 288.

That a patentee may make a contract which is lawful at common law does not warrant the converse of the proposition, i. e., that persons having only common-law rights can make a contract warrantable only under the patent and copyright laws.

The control which the petitioner is attempting to maintain over the subsequent trade, by its vendees, in the goods manufactured by it, is in general restraint of trade and is therefore unlawful at common law.

A restraint of trade may affect the public directly, or the interests of the parties to the contract or agreement directly, and the public only indirectly. 2 Parsons on [891] Contracts, 7th ed., 887; *Alger v. Thatcher*, 19 Pick. 51; *Fowle v. Park*, 131 U. S. 88; *Central Transp. Co. v. Pullman Car Co.*, 139 U. S. 24, 58; *Vickery v. Welch*, 19 Pick. 528; *United States v. Addyston & Co. Co.*, 85 Fed. Rep. 271.

The system established and maintained by the petitioner controls the entire trade in the articles manufactured by it and is necessarily a general restraint of the trade in the articles in question.

In *Oliver v. Gilmore*, 52 Fed. Rep. 562; *Dolph v. Troy*, 28 Fed. Rep. 528; *In re Greene*, 52 Fed. Rep. 104; *United States v. Nelson*, 52 Fed. Rep. 626; *Dusber Watch Co. v. Howard*, 55 Fed. Rep. 851; *Olmstead v. Distilling Co.*, 77 Fed. Rep. 265; *Phillips v. Iola Cement Co.*, 125 Fed. Rep. 593; *Knapp v. Jarvis*, 135 Fed. Rep. 1008; *Grogan v. Olafse*, 158 California, 611; *Walsh v. Dwight*, 40 App. Div. 518; *Garet v. Harris*, 177 Massachusetts, 72; and *Garet v. Charles*, 187 Massachusetts, 144, the courts held the contracts not unlawful because the arrangement did not affect the entire commodity or the right of others to engage in the same business and hence affected in no way the general trade in the articles; and see also *Whitwell v. Tobacco Co.*, 125 Fed. Rep. 454; *Commonwealth v. Straws*, 186 Massachusetts, 229; *United States v. Jellico & Co. Co.*, 46 Fed. Rep. 432; *United States v. Coal Dealers' Assn. of Cal.*, 85 Fed. Rep. 252; *Clack-*

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Peake & Ohio Fuel Co. v. United States, 115 Fed. Rep. 610; *United States v. Addyston &c. Co.*, 85 Fed. Rep. 271; aff'd 175 U. S. 211.

For contracts held illegal as constituting or tending to create a monopoly, because their effect was to control and regulate all or such a large proportion of the entire trade in an article of commerce as to affect injuriously the public interests, see *Cravens v. Carter*, 92 Fed. Rep. 479; *Montague v. Lowry*, 115 Fed. Rep. 27; *S. C.*, 193 U. S. 38; *Gibbs v. McNeeley*, 118 Fed. Rep. 120; *Swift & Co. v. United States*, 196 U. S. 375; *Getz v. Federal Salt Co.*, 147 California, 115; *Hunt v. Riverside Club*, 12 Det. Leg. N. 264; *Owen* [392] v. *Bryan*, 77 N. E. Rep. 302; *Clanoy v. Onondaga &c. Co.*, 62 Barb. 395; *Dewitt Wire Cloth Co. v. N. J. Wire Cloth Co.*, 16 Daly, 529; *People v. Duke*, 19 Misc. (N. Y.) 292; *Tuscaloosa Ice Co. v. Williams*, 127 Alabama, 110; *Finch v. Grunite Co.*, 187 Missouri, 244; *Charleston Co. v. Kanawha Co.*, 50 S. Car. 876; *Lowry v. Tile, Mantel & Grate Assn.*, 106 Fed. Rep. 38; *Ellis v. Inman*, 131 Fed. Rep. 182; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401, 404; *Cohen v. Envelope Co.*, 166 N. Y. 292; *Salt Co. v. Guthrie*, 35 Oh. St. 666; *Distilling Co. v. Moloney*, 156 Illinois, 448; *State v. Standard Oil Co.*, 49 Oh. St. 137; *People v. North River Sugar Co.*, 54 Hun, 345; aff'd 123 N. Y. 587; *Bishop v. Preservers' Co.*, 157 Illinois, 284; *Harding v. Glucose Co.*, 182 Illinois, 551; *Chicago &c. Coal Co. v. People*, 214 Illinois, 421; *Texas Standard Oil Co. v. Adone*, 83 Texas, 650; *State v. Armour Co.*, 173 Missouri, 356; *Santa Clara v. Hayes*, 76 California, 287; *Pacific Factor Co. v. Adler*, 90 California, 110; *Cleland v. Anderson*, 66 Nebraska, 252; *Brown v. Jacobs*, 115 Georgia, 429.

The restraint petitioner is attempting to maintain is, even if partial, unreasonable and therefore unlawful. *Parks & Sons v. Hartman*, 153 Fed. Rep. 24, 41.

The control the petitioner is attempting to maintain over the entire trade, in the goods manufactured by it, and the system of contracts by which it is attempting to carry out that purpose, are illegal, under the provisions of the Sherman Anti-trust Act.

Argument for Respondent.

Its goods are sold to the wholesale and jobbing druggists throughout nearly all of the States of the United States. This is interstate commerce. *Addyston v. United States*, 175 U. S. 211; *Montague v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; and see *Lowe v. Lawlor*, 208 U. S. 274, 293.

The necessary effect of granting the relief would be to [393] create by judicial sanction a right which can only arise from statute.

The relief should not be granted because its effect would be to aid the petitioner in carrying out that which is unlawful. *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 24; *Gibbs v. Gas Co.*, 130 U. S. 396; *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 41 La. Ann. 970; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Hooker v. Vandewater*, 4 Denio, 349; *Cummings v. Union Blue Stone Co.*, 164 N. Y. 401; *Emery v. Ohio Candle Co.*, 47 Oh. St. 320; 2 High on Injunctions, 3d ed., § 1106; 1 Pomeroy's Eq. Jurisp., §§ 402 *et seq.*

The bill does not set forth facts entitling the petitioner to relief against the respondent.

The mere allegation of knowledge on the part of the respondent of the petitioner's method of business, is not sufficient to warrant the relief restraining it from purchasing the goods. *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18, 21; *Sperry v. Hertzberg*, 60 Atl. Rep. 368; *Taddy v. Sterious* (1904), 1 Ch. Div. 254; *McGruther v. Pitcher* (1904), 2 Ch. Div. 306; *Garst v. Hall*, 179 Massachusetts, 588.

The mere inducement is not sufficient, it must be an unlawful inducement, or an inducement by misrepresentation and fraudulent and wrongful means. *National Phonograph Co. v. Edison-Bell Co.*, L. R. (1908) 1 Ch. Div. 335, 362, 371; *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82; *Angle v. Chicago & C. Ry. Co.*, 151 U. S. 1; *Garst v. Hall*, 179 Massachusetts, 588, *supra*.

The facts constituting such fraud, wrongful inducement and unlawful means, must be averred. *Setzar v. Wilson*, 4 Ired. (N. C.) 501; *McHenry v. Hazard*, 45 Barb. 657; *Han-*

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son v. Langan, 30 N. Y. St. Rep. 828; *Butler v. Viele*, 44 Barb. 166; *Reed v. Guano Co.*, 47 Hun, 410; *Bank v. Rochester*, 41 Barb. 341; *Hilson v. Libby*, 44 N. Y. Superior Ct. 12; *Benedict v. Dake*, 6 How. 352, 353; *Davenport v. [894] Taussig*, 31 Hun, 563; *Hazard v. Griswold*, 21 Fed. Rep. 178; *Savings Bank v. Supervisors*, 22 Fed. Rep. 580.

Petitioner has no cause of complaint because the respondent defaces and mutilates the labels or printed matter upon the packages which it purchases and owns.

Mr. Justice HUGHES, after making the above statement, delivered the opinion of the court.

The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines its manufactures, embracing interstate commerce as well as commerce within the States respectively. To accomplish this result it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract known as "*Consignment contract—wholesale*," has been made with over four hundred jobbers and wholesale dealers, and the other, described as "*Retail agency contract*," with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract to the injury of the other and that, in the absence of an adequate remedy at law,

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equitable relief will be granted. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U. S. 1; *Bitterman v. Louisville & Nashville Railroad*, 207 U. S. 205.

The principal question is as to the validity of the restrictive agreements.

Preliminarily there are opposing contentions as to the construction of the agreements, or at least of that made with jobbers and wholesale dealers. The complainant insists that the "consignment contract" contemplates a true consignment for sale for account of the complainant, and that those who make sales under it are the complainant's agents and not its vendees. The court below did not so construe the agreement and considered it an effort "to disguise the wholesale dealers in the mask of agency upon the theory that in that character one link in the system for the suppression of the 'cut rate' business might be regarded as valid," and that under this agreement "the jobber must be regarded as the general owner and engaged in selling for himself and not as a mere agent of another." 164 Fed. Rep. 805.

There are certain allegations in the bill which do not accord with the complainant's argument. Thus it is alleged that it "has been and is the uniform custom" of the complainant "to sell said medicines, remedies and cures to jobbers and wholesale druggists, who in turn sell and dispose of the same to retail druggists for sale and distribution to the ultimate purchaser or consumer." And in setting forth the form of the agreement in question it is alleged that it was "required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines and cures." It is further stated that as a means of maintaining "said list of prices," cards bearing serial identifying numbers are placed in each package of remedies "sold to jobbers and wholesale druggists." But it is also alleged in the bill that under the provisions [396] of the contract the title to the medicines remained in the complainant "until actual sale in good faith to retail dealers, as therein provided."

Turning to the agreement itself, we find that it purports to appoint the party with whom it is made one of the complainant's "wholesale distributing agents," and it is agreed

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that the complainant, as proprietor, shall consign to the agent "for sale for the account of said proprietor" such goods as it may deem necessary, "the title thereto and property therein to be and remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancellation of this agreement." The goods are to be invoiced to the consignee at stated prices, which are the same as the minimum prices at which the consignee is allowed to sell. It is also agreed that the consignee shall "faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation * * * a commission of 10 per cent of the invoice value, and a further commission of 5 per cent on the net amount of each consignment, after deducting the said 10 per cent commission, on all advances on account remitted within ten days from the date of any consignment," such advances, however, not to affect the title to the goods and to be repaid should the agreement be terminated and unsold goods, on which advances had been made, be returned. The consignee guarantees payment for all goods sold and promises "to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding."

The consignee agrees "to sell only to the designated retail agents of said proprietor as specified in lists of such retail agents furnished by said proprietor and alterable at the will of said proprietor." A further provision permits sales "only to the said retail or wholesale agents [897] of said proprietor, as per list furnished." No time is fixed for the duration of the agreement.

It is urged that the additional commission of 5 per cent is to induce, through the guise of "advances," payment for the goods before sales are made, and that unsold goods are to be returned only on the complainant's demand and the cancellation of the agreement. But the consignee is not bound to make these "advances" and it is distinctly provided that he shall not acquire title by making them. It is also said that the consignee may sell at prices higher than those listed, but he is bound by the agreement to account for

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"the proceeds of all sales" less the stipulated commissions. Nor is the provision as to the time for accounting and remittance of net proceeds to be regarded as inconsistent with agency, in the absence of a showing that in the actual transactions and accounts the consignee was treated as selling on his own behalf and paying as purchaser.

If, however, we consider the "consignment contract" as one which in legal effect provides for consignments of goods to be sold by an agent for his principal's account, and that the tenor of the agreement as set forth must be taken to override the inconsistent general allegations to which we have referred, this alone would not be sufficient to support the bill.

The bill charges that the defendant has unlawfully and fraudulently procured the proprietary medicines from the complainant's "wholesale and retail agents" in violation of their contracts. But it does not allege that the goods procured by the defendant from "wholesale agents" were goods consigned to the latter for sale. The description "wholesale agent" refers to those who have signed the "consignment contract." This contract, however, permits one "wholesale agent" to sell to another "wholesale agent." For all that appears, the goods procured by the defendant may have been purchased by the defendant's [398] vendors from other wholesale agents. The bill avers that prior to the introduction of the described system the defendant, a wholesale house, had dealt in the remedies and had purchased them from the complainant and from "wholesale druggists and jobbers." There is nothing in the bill which is inconsistent with such an actual course of dealing, permitted by the agreement itself, with respect to the wholesale dealers who have signed it. But the goods which one wholesale agent purchased from another wholesale agent would not be held for sale as consigned goods belonging to the complainant and to be accounted for as such; and their sale by the wholesale dealer, who had acquired title, would be made for his own account and not for that of the complainant. The allegations of the bill and the plain purpose of the system of contracts do not permit the conclusion that it was intended that wholesale dealers purchasing goods in this way should be free to sell to any one at any price. Evidently it was not contemplated

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that the restrictions of the system should be escaped in such a simple manner. But if the restrictions of the "consignment contract," as to prices and vendees, are to be deemed to apply to the sale of goods which one wholesale dealer has purchased from another, it is evident that the validity of the restrictions in this aspect must be supported on some other ground than that such sale is made by the wholesale dealer as the agent of the complainant. The case presented by the bill cannot properly be regarded as one for inducing breach of trust by an agent.

The other form of contract, adopted by the complainant, while described as a "retail agency contract," is clearly an agreement looking to sale and not to agency. The so-called "retail agents" are not agents at all, either of the complainant or of its consignees, but are contemplated purchasers who buy to sell again, that is, retail dealers. It is agreed that they may purchase the medicines manu[899]factured by the complainant at stated prices. There follows this stipulation:

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company."

It will be noticed that the "retail agents" are not forbidden to sell either to wholesale or retail dealers if these are "accredited agents" of the complainant, that is if the dealers have signed either of the two contracts the complainant requires. But the restriction is intended to apply whether the retail dealers have bought the goods from those who held under consignment or from other dealers, wholesale or retail, who had purchased them. And in which way the "retail agents" who supplied the medicines to the defendant, had bought them is not shown.

The bill asserts complainant's "right to maintain and preserve the aforesaid system and method of contracts and sales adopted and established by it." It is, as we have seen, a system of interlocking restrictions by which the complain-

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ant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or sub-purchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. The essential features of such a system are thus described by Mr. Justice Lurton (then Circuit Judge), in the opinion of the Circuit Court of Appeals in the case of *John D. Park & Sons Company v. Samuel B. Hartman*, 153 Fed. Rep. 24, 42:

"The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell [400] below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition has been brought about."

That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists and a majority of the retail druggists of the country" and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Bement v. National Harrow Co.*, 186 U. S. p. 92; *Montague & Co. v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 275.

But it is insisted that the restrictions are not invalid either at common law or under the act of Congress of July 2, 1890, c. 647, 26 Stat. 209, upon the following grounds, which may be taken to embrace the fundamental contentions for the complainant: (1) That the restrictions are valid because they relate to proprietary medicines manufactured under a secret

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process; and (2) that, apart from this, a manufacturer is entitled to control the prices on all sales of his own products.

First. The first inquiry is whether there is any dis-[401]tinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to rights secured by letters patent. *Bement v. National Harrow Company*, 186 U. S. 70. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent with stipulations as to the prices at which the licensee should sell. The court said, referring to the act of July 2, 1890 (pp. 92, 93):

"But that statute clearly does not refer to that kind of restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use and sale. As was said by Chief Justice Marshall in *Grant v. Raymond*, 6 Pet. 241-243:

"It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. * * * The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. * * * The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the com[402]pensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use and sell, the things discovered for a limited time."

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The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute and thus to secure the privileges it confers. Its case lies outside the policy of the patent law, and the extent of the right which that law secures is not here involved or determined.

The complainant relies upon the ownership of its secret process and its rights are to be determined accordingly. Any one may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its right in the process by fraud or by breach of trust or contract. *Tabor v. Hoffman*, 118 N. Y. 36; *Chadwick v. Covell*, 151 Massachusetts, 190. The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. *Fovle v. Park*, 131 U. S. 88. A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236.

Here, however, the question concerns not the process of manufacture, but the manufactured product, an article of commerce. The complainant has not communicated its process in trust, or under contract, or executed a license for the use of the process with restrictions as to the manufacture and sale by the licensee to whom the communication is made. The complainant has retained its secret which apparently it believes to be undiscoverable. Whether its remedies are sold or unsold, whether the restrictions as to future sales are valid or invalid, the complainant's secret remains intact. That the complainant may rightfully ob-
[403]ject to attempts to discover it by fraudulent means, or to a breach of trust or contract relating to the process, does not require the conclusion that it is entitled to establish restrictions with respect to future sales by those who purchase its manufactured product. It is said that the remedies "embody" the secret. It would be more correct to say that they are manufactured according to the secret process and do not constitute a communication of it. It is also urged

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that as the process is secret no one else can manufacture the article. But this argument rests on monopoly of production and not on the secrecy of the process or the particular fact that may confer that monopoly. It implies that, if for any reason monopoly of production exists, it carries with it the right to control the entire trade of the produced article and to prevent any competition that otherwise might arise between wholesale and retail dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by any one who secured control of the source of supply of a necessary raw material or ingredient. But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title. Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership and his dominion does not depend upon whether the process of manufacture is known or unknown, or upon any special advantage he may possess by reason of location, materials or efficiency. The fact that the market may not be supplied with the particular article, unless he produces it, is a practical consequence which does not enlarge his right of property in what he does produce.

If a manufacturer, in the absence of statutory privilege, has the control over the sales of the manufactured article, [404] for which the complainant here contends, it is not because the process of manufacture is kept secret. In this respect, the maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers. The fact that the article is represented to be curative in its properties does not justify a restriction of trade which would be unlawful as to compositions designed for other purposes.

Second. We come, then, to the second question, whether the complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture.

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The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer.

But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, section 360, 'be possessed of a horse or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath [405] no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.'" *Park v. Hartman*, *supra*. See also Gray on Restraints on Alienation, §§ 27, 28.

Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. It has been held by this court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339. There the court said (p. 351):

"The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the

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statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment."

It will hardly be contended, with respect to such a matter, that the manufacturer of an article of commerce, not protected by any statutory grant, is in any better case. See *Taddy & Co. v. Sterious & Co.* (1904), 1 Ch. 354; *McGruther v. Pitcher* (1904), 2 Ch. 306; *Garst v. Hall & Lyon Co.*, 179 Massachusetts, 588. Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement.

[406] With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in *Gibbs v. Baltimore Gas Co.*, 130 U. S. p. 409:

"The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181; S. C., Smith's Leading Cases, 407, 7th Eng. ed.; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon v. Rousillon*, 14 Ch. D. 351; *Leather Cloth Co. v. Lorseat*, L. R. 9 Eq. 345."

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"The true view at the present time," said Lord Macnaghten in *Nordenfelt v. Maxim-Nordenfelt & Co.*, 1904, A. C. p. 565, "I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special [407] circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public."

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged in-

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jury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they [408] sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. *People v. Sheldon*, 139 N. Y. 251; *Judd v. Harrington*, 139 N. Y. 105; *People v. Milk Exchange*, 145 N. Y. 267; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. Rep. 271; on app. 175 U. S. 211; *Montague & Co. v. Lowry*, 193 U. S. 38; *Chapin v. Brown*, 83 Iowa, 156; *Craft v. McConoughy*, 79 Illinois, 346; *W. H. Hill Co. v. Gray & Worcester*, 127 N. W. Rep. (Mich.) 803.

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by

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several manufacturers or by one, [409] or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

The questions involved were carefully considered and the decisions reviewed by Judge Lurton in delivering the opinion of the Circuit Court of Appeals in *Park v. Hartman*, *supra*, and, in following that case, it was concluded below that the restrictions sought to be enforced by the bill were invalid both at common law and under the act of Congress of July 2, 1890. We think that the court was right.

The allegations of the bill as to the labels and cartons used by the complainant are evidently incidental to the main charge as to the procurement of violation of the restrictions as to prices and vendees contained in the agreement; and failing as to this no case is made for relief with respect to the trade-marks, which are not shown to have been infringed.

Judgment affirmed.

Mr. Justice LURTON took no part in the consideration and decision of this case.

Mr. Justice HOLMES, dissenting.

This is a bill to restrain the defendant from inducing, by-corruption and fraud, agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price. There are two contracts concerned. The first is that of the jobber or wholesale agent to whom the plaintiff consigns its goods, and I will say a few words about that, although it is not this branch of the case that induces me to speak. That they are agents and not buyers I understand to be conceded, and I do not see how it [410] can be denied. We have nothing before us but the form and the alleged effect of the written instrument, and they both are express that the title to the goods is to remain in the plaintiff until actual sale as permitted by the contract. So far as this contract limits the authority of the agents as agents I do not understand its validity to be disputed.

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But it is construed also to permit the purchase of medicine by consignees from other consignees, and to make the specification of prices applicable to goods so purchased as well as to goods consigned. Hence when the bill alleges that the defendant has obtained medicine from these agents by inducing them to break their contracts, the allegation does not require proof of breach of trust by an agent, but would be satisfied by proving a breach of promise in respect of goods that the consignee had bought and owned. This reasoning would have been conclusive in the days of Saunders if the construction of the contract is right, as I suppose that it is. But the contract as to goods purchased is at least in the background and obscure; it is not the main undertaking that the instrument is intended to express. I should have thought that the bill ought to be read as charging the defendant with inducing a breach of the ordinary duty of consignees as such (*Swift & Co. v. United States*, 196 U. S. 875, 895), and, therefore, as entitling the plaintiff to relief. *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1.

The second contract is that of the retail agents, so called, being really the first purchasers, fixing the price below which they will not sell to the public. There is no attempt to attach a contract or condition to the goods, as in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, or in any way to restrict dealings with them after they leave the hands of the retail men. The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids a purchaser to contract with his vendor that he will not sell [411] below a certain price. This is the important question in this case. I suppose that in the case of a single object such as a painting or a statue the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. In the first place by a slight change in the form of the contract the plaintiff can accomplish the

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result in a way that would be beyond successful attack. If it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

But I go farther. There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What then is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than [412] are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter it seems to me that the point of most profitable returns marks the equilibrium of social desires and determines the fair price in the

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only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

The conduct of the defendant falls within a general prohibition of the law. It is fraudulent and has no merits of its own to recommend it to the favor of the court. An injunction against a defendant's dealing in non-transferable round-trip reduced rate tickets has been granted to a railroad company upon the general principles of the law protecting contracts, and the demoralization of rates has [413] been referred to as a special circumstance in addition to the general grounds. *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 206, 222, 223, 224. The general and special considerations equally apply here, and we ought not to disregard them, unless the evil effect of the contract is very plain. The analogy relied upon to establish that evil effect is that of combinations in restraint of trade. I believe that we have some superstitions on that head, as I have said; but those combinations are entered into with intent to exclude others from a business naturally open to them, and we unhappily have become familiar with the methods by which they are carried out. I venture to say that there is no likeness between them and this case. *Jayne v. Loder*, 149 Fed. Rep. 21, 27; and I think that my view prevails in England. *Elliman, Sons & Co. v. Carrington & Son, Limited* [1901], 2 Ch. 275. See *Garst v. Harris*, 177 Massachusetts, 72; *Garst v. Charles*, 187 Massachusetts, 144. I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my view in this dissent.

Statement of the Case.

[63] DARIUS COLE TRANSP. CO. v. WHITE STAR LINE.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1911.)

[186 Fed. Rep., 63.]

MONOPOLIES (§12)—FEDERAL ANTI-TRUST ACT—CONSTRUCTION AND SCOPE.—The sale of a business and the good will pertaining to it, and an agreement, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as a part of the sale of the business, and not as a device to control commerce, is not within the federal anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), but such act renders unlawful every contract combination or conspiracy which directly or necessarily operates in restraint of trade between the states without regard to the form which the transaction takes.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

[64] MONOPOLIES (§ 16)—FEDERAL ANTI-TRUST ACT—ILLEGAL CONTRACTS—LEASE OF VESSEL.—Libelant and respondent were both owners of steamers running regularly between Detroit and Toledo, and for a number of years had operated under a pooling arrangement which gave them a monopoly. At the expiration of such arrangement, libelant sold one of its boats and leased the other to respondent for a term of three years to be run between such two points, and at the same time transferred its good will, and agreed not to engage in competition during the term. The rental reserved was more than the steamer could have earned operated independently. *Held*, on the evidence, that the dominant purpose of the parties was to enable respondent to maintain its monopoly of the business, and that the lease was void as in violation of Sherman Anti-Trust Law July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and rent could not be recovered thereon.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 13.]

SEVEREANS, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit in admiralty by the Darius Cole Transportation Company against the White Star Line. Decree for respondent, and libelant appeals. Affirmed.

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F. O. Harvey (J. J. Speed, of counsel), for appellant.

Gray and Gray, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge.

This is an appeal from a decree dismissing the libel filed by appellant for the recovery of two installments of rent upon a lease of the steamer *Idlewild*; the decree being based upon the ground that the contract of lease was void as being in restraint of trade under the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The lease was made March 8, 1900, for a term of three years, at an annual rental of \$18,000, with a provision for the substitution (without additional rental), during a portion of the season, of the steamer *Arundell*, owned by appellant, and then engaged during a short season in navigating Lake Ontario, and with further provision for the use of the *Arundell* by appellee (in connection with the *Idlewild*) for another portion of the season, at the option of appellant at an added rental. The *Idlewild* was to be run "as a passenger and packet freight steamboat between Port Huron and Detroit, Michigan, and Toledo, Ohio, and upon any portion of said route," and in connection with the lessee's "other steamers in the passenger and packet freight business on the river and lakes between Port Huron, Michigan, and Toledo, Ohio." By the eleventh paragraph of the charter the lessor "agrees to surrender to the party of the second part all of the good will of the 'river business,' so-called, that may be controlled by it, and to that end agrees not to enter into competition with the party of the second part upon the routes herein named, and not to operate any of its vessels or any vessel [65] whatsoever on the said routes between Detroit and Port Huron or between Detroit and Toledo during the period of the said three years."

1. It is well settled that the sale of a business, and the surrender of the good will pertaining to that business, and

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an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control commerce, is not within the federal anti-trust law. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 185, 26 Sup. Ct. 208, 50 L. Ed. 428; *Fisheries Co. v. Lennen* (C. C.) 116 Fed. 217; *Davis v. A. Booth & Co.* (8th Circuit) 131 Fed. 31, 65 C. A. 269.

On the other hand, it is equally well settled that the federal anti-trust law forbids every contract, combination, or conspiracy which directly or necessarily operates in restraint of trade between the states without regard to the form which the transaction takes. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 299; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 619, 620, 53 C. C. A. 256, 265, 266; *Clark v. Needham*, 125 Mich. 84, 85, 87, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559. See, also, cases cited in *Bigelow v. Cahumet & Hecla Min. Co.* (C. C.) 155 Fed. 869, 874.

2. The determination of this case must therefore turn upon the answer to the question whether the restraint imposed was merely incidental to the lease, or whether, on the other hand, the lease was a device to control interstate commerce; in other words, upon the dominant purpose of the parties in making the lease. This is a question of fact, to be determined from all the circumstances of the case. The question as presented here is in some respects novel, and is not entirely easy of solution. The oral evidence was taken in open court, and consisted of the testimony of the representatives of the respective parties who, on behalf of their principals, negotiated the lease in question. Upon a careful consideration of this testimony, in connection with the documentary evidence, and giving due consideration to the opportunity possessed by the trial judge to determine the weight to be

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given the testimony of the witnesses, we are disposed to agree with the conclusion reached by the court below, that the agreement violates the federal anti-trust law. Among the important considerations which lead to this conclusion are these:

For 12 years previous to the making of the lease in question a monopoly of river and lake transportation between the points named in the charter party in question had been maintained under a pooling arrangement between the owners of the respective lines of boats, including the parties to this litigation, with the exception of one year, during which there was a division of territory. During the years 1897, 1898, and 1899 there were four companies in the pool. By the time this pooling arrangement expired, two of the four parties had disposed of their interests to the other two, who became the parties to the 1900 [66] arrangement in question, the libellant having made a sale on credit of one of its boats and the respondent having acquired a third boat. The arrangement of 1897 to 1899 was held by the Supreme Court of Michigan, in a suit brought by appellee here against the remaining parties to the agreement, for contribution on account of a recovery for personal injuries, to be an unlawful combination under the federal anti-trust law. *White Star Line v. Star Line of Steamers et al.*, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551. It is conceded here that the agreement of 1897 to 1899 was in violation of that law, and it is apparent that the object of the arrangement for the entire period between 1888 and 1899 was a monopoly of the traffic in question. We cannot regard this fact as immaterial in arriving at a determination of the dominant purpose of the parties in making the lease. In our opinion the previous relations of the parties, while not necessarily controlling, furnish a valuable sidelight upon the purpose of the agreement here in question. The case before us must be determined upon its own peculiar facts. The district judge seems to have reached the conclusion that the object of the appellee in chartering the *Idlewild* was to eliminate appellant's competition, and that in making the charter he "aimed at the same control of the traffic which he had before," and

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that the appellant entered into the contract with the knowledge of its purpose and effect as restraining competition. The charter for the years 1900 to 1902, which is before us, produced the result accomplished by the arrangements between 1888 and 1899 and was intended to do so. The district judge found as a fact that the rentals paid for the use of the *Idlewild* were greatly in excess of the earnings of that steamer. We think the testimony sustains that conclusion. While there is some conflict of testimony, we think it a reasonable deduction that the annual rental fixed was practically an average of the annual earnings of the *Idlewild* during the 12 years' existence of the pooling arrangement, and that this amount was about \$4,000 greater per year than the *Idlewild* was able to earn, except as her share of the earnings under a practically complete monopoly of this traffic. Indeed, the appellee's manager testified:

"From an earning standpoint, in the hands of anybody, she (the *Idlewild*) perhaps was worth only \$9,000, but in our hands and to do away with opposition, she was worth \$13,000 to us."

It is urged that the *Idlewild* could not have competed with the appellant's three boats, and that the former must therefore, had this lease not been made, have remained out of commission. But we are not satisfied that such is the case. Indeed, as we understand the record, appellant's manager conceded that he might have used the *Idlewild* on the route between Detroit and Toledo; and it is by no means clear that appellant would have experienced any difficulty in supplementing the *Idlewild* with another boat, if necessary to maintain competition. There is also evidence that appellant's manager had, or claimed to have, such competition in mind if the lease in question were not made.

If it was the dominant purpose of both parties, when making the lease, to preserve the monopoly which they had participated in creating, and in maintaining for a period of years, the contract was, in our judgment, none the less invalid, from the fact that the lessor, instead of receiving for the use of the boat a share of the profits of a pool, obtained as annual rental an amount which experience in the pool showed was the average annual earnings assigned to the boat

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in question—an amount materially larger than the boat could have itself earned while operated under the lease.

This must be so unless we are prepared to hold that a combination made for the purpose of maintaining a monopoly is made lawful by the fact that the rental of one of the boats used in the combination was fixed in amount. Can it make any difference with the result that the lessor did not propose the insertion of stipulations against competition, if he knew that the object of the lessee was to effect a continuance of the monopoly which had been maintained by the participation of the parties up to that time, and that such would be its effect, and approved of such result, knowing that it, as lessor, was receiving a rental which could only be paid because of the securing of such monopoly?

In view of the circumstances which have been just stated, did the form the transaction took make it any less a contract in restraint of trade? Should not in such case the dominant purpose of both parties be held to be to restrain commerce?

In *United States v. Trans-Missouri Freight Ass'n* and in *United States v. Joint Traffic Ass'n*, *supra*, is found language sustaining the inference that a lease and sale stand upon the same basis. It must be conceded that there is no necessary difference between rules pertaining to sales and leases. It seems obvious, however, that a lessor may have a greater interest in creating and maintaining a monopoly than a vendor from the fact that on the termination of the lease the lessor, as the owner of boats suitable for the traffic in question, would be interested in the existence of as little competition as possible. The fact that, as we understand the record, appellant did engage in the river and lake traffic in question, upon the expiration of the charter under consideration, lends color to the view that it was to appellant's interest to maintain the same arrangement in which it had participated during the years previous to the charter in question. The fact that the parties did not renew their arrangement on the expiration of this charter is not significant, for by the time it had expired the parties were in litigation, first, in the suit in the state court referred to, and, second, by the institution of the present suit for rental under the charter in question.

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here—in which cases the reciprocal defenses were made that the respective agreements were in contravention of the federal statutes. It is to be noted, as of some pertinency, that by the fifth paragraph of the lease appellee specifically agreed that the leased boat should be operated in connection with his other steamers over the same routes which had been so controlled by the parties for many years preceding.

The theory on which stipulations against competition in connection with bona fide sales have been held not to violate the federal anti-trust law is that such restraint is no greater than required for the protection of the legitimate interests of the vendee, and that such restraint is therefore merely incidental to the main purpose, to wit, the sale and purchase. See *United States v. Trans-Missouri Freight Ass'n*; *United* [68] *States v. Joint Traffic Ass'n*; *Bement v. National Harrow Co.*; *Cincinnati Packet Co. v. Bay*; *Davis v. A. Booth & Co.*, heretofore cited.

On the other hand, if the restraint imposed is greater than necessary to afford a fair protection to the legitimate interests of a vendee or lessee, the contract is rendered void. *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 425, 28 Sup. Ct. 572, 52 L. Ed. 865. The same test has been recognized by this court in several cases under the common law, including *Hitchcock v. Anthony*, 88 Fed. 779, 28 C. C. A. 80; *American Strawboard Co. v. Haldeman Paper Co.*, 88 Fed. 619, 27 C. C. A. 684; *Knapp v. S. Jarvis Adams Co.*, 135 Fed. 1008, 70 C. C. A. 536; *Prairie v. Ferrell*, 166 Fed. 702, 92 C. C. A. 374.

Can this test apply, that is to say, can the lessee be said to have legitimate interests to protect, when his dominant purpose in taking the lease, and which is approved by the lessor, is to continue a monopoly which both have participated in creating and maintaining? We are constrained to the opinion that the district judge did not err in holding the agreement unlawful.

It is urged that, even if the agreement in relation to the interstate commerce route between Detroit and Toledo is void, the remainder of the contract may be enforced as valid. There is in our judgment no force in this contention. The

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contract is entire and indivisible. The only use which respondent had of the *Idlewild* was under the contract, and that being void, and no bases existing for an apportioning of earnings under the interstate route from those earned wholly within the state, and thus no means of separating the legal from the illegal provision, it follows that no recovery can be had.

SEVERENS, Circuit Judge (dissenting).

In my opinion the judgment proposed by the majority of the court is erroneous; and, as the subject is one of much interest to the business public, and my conviction is so positive that the decision is not in accordance with the settled interpretation of the Sherman Act, I think it my duty to record my dissent and state the reasons for it.

I assume as a postulate that the act is not intended to prohibit that class of contracts so long sanctioned, whereby the owner of property or business, for a valuable consideration, conveys it, or some valuable interest in it, to another, and at the same time and for the same consideration agrees not to do anything which shall tend to diminish the value of the subject-matter of his conveyance, whether it be of a business or of some specific real or personal property.

A lease of a vessel for employment on a certain specified route on which the owner has hitherto employed it is a proper contract in which such a stipulation may be made. The contract which these parties made is not obnoxious to the provisions of the act referred to. It is not affected by the circumstance that these parties had before that time been in a combination with other parties which was, and had been adjudged to be, illegal. As to any new agreement, they had the same capacity and privilege as other people to make contracts concerning their property and business. Whether such new contract offends the law depends upon its stipulations. If they are not unlawful and their due performance is not unduly prejudicial to the [69] public, they cannot be impeached by suspicion or even proof that the parties intended something wrong so long as that proof does not go to any act or fact extraneous to the contract. Intentions do

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not count in business transactions unless they are carried into effect by a contract.

Judge Andrews in the course of an elaborate opinion upon this subject, delivered in the case of *Diamond Match Co. v. Roeder*, 106 N. Y. 472, 18 N. E. 419, 60 Am. Rep. 464, said:

"We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

And this defendant is not claiming that there was any stipulation outside the contract which made it other than what it purports to be. On the contrary, the defendant plants its defense upon the contract itself and in its answer to the libel sets it up as a valid defense. There is no suggestion of any extraneous stipulation which by its association with the contract would make it unlawful. It is true the answer sets up the previous unlawful combination, and how it was denounced by the supreme court of the state. And then the defendant attempts to carry the taint of that transaction over into the new contract and so infect it with the same illegality. Upon what legal inference or logic this result is accomplished is not apparent. In the court below witnesses were called and testified about what seems to me to be irrelevant and immaterial subjects; and stress is laid upon the circumstance that the district judge saw the witnesses and heard them testify. But I cannot help thinking, with all due respect to the opinion of my associates, that the oral testimony adduced at the hearing in the court below was of no legal significance, both because there was no pleading which raised any issue beyond that which the reference to the contract itself and the earlier combination presented, but because the testimony referred to does not tend to show that anything more than the due performance of the contract was at any time agreed to be done, or ever was done.

Turning again to the instrument itself, the only point raised in the argument made to show that the parties agreed to do something which would be in violation of the Sherman Act is that the sum agreed to be paid for the use of the

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vessel considerably exceeded the fair rental value of the use. This is supposed to give ground for suspicion. But what evil object the suspicion rests upon is not so "bodied forth" as to be discernible. Besides, it is the ordinary and expected thing in such cases that the vendee will pay more than the value of the principal subject of the contract, and that some part of the consideration goes for the ancillary stipulation. The defendant in its answer to the libel very properly puts the matter thus:

"That the rental price agreed to be paid for the steamers *Idlewild* and *Arundell* was largely in excess of their real rental value, and that the same was agreed to be paid in consideration of the undertaking of the libellant not to enter into competition with the defendant upon said route during the period of said contract."

[70] Just what the Sherman Act means by the term "monopolizing" is not yet settled, and it may be that it will have to be done by the processes of inclusion and exclusion. But it already seems safe enough to say that it does not include such a result as a man may attain by his own endeavor and without the suppression of competition other than such as inures to him through the ancillary stipulations of a lawful contract, such as these. There is no forbidden monopolizing in this, nor any undue restraint of trade. There was here no agreement to bring other parties into a combination, or to induce them not to enter into competition. There was no stipulation that the lessor should have any interest in the proceeds of the business which it was expected would be carried on by the lessee; nor was there any sort of combination in the enterprise. If the lessor had sold the vessel outright, and had stipulated not to compete in the business in which she was to be employed, it would have been the common case in which such ancillary stipulations have been adjudged to be lawful. Here the vessel was leased for a term of years, and the restraint which the lessor put upon itself was for the same period. All the vessels on the Great Lakes which then were or might be built and be capable of such service were as free as ever to ply the business of carriers of passengers and freight between these ports.

The defendant naively avows in its answer and makes oath that at the time when it made this contract it was advised

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and believed that it was valid and binding. And upon such a pledge of its sincerity we may properly assume that during the years when it was using the vessel it held to the same faith. Otherwise it would have abandoned the contract and restored the vessel to its owner. It was not until pay day arrived that it was able to see things in what it now thinks is the proper light. I do not mean to say that it is not permissible in law for a party to alter his position in this way and in circumstances where the law permits it on grounds of public policy, but the conditions are recited to indicate the duty of the court to put such a construction upon the contract and give it such effect as will make it valid and obligatory if such construction is fairly possible.

In my opinion the public interest was not impaired in any way which would render the contract obnoxious to the prohibitions of the Sherman Act; and I cannot help thinking that a decision to the contrary would be opposed to the settled law, and if followed would render the making of any of this kind of contracts practically impossible, and must think that the public interest would be better served by compelling the defendant to perform its agreement.

[174] MOTION PICTURE PATENTS CO. *v.* ULLMAN
ET AL.

(Circuit Court, S. D. New York. September 27, 1910.)

[186 Fed. Rep., 174.]

MONOPOLIES (§ 21)—RIGHTS OF MEMBERS—SUIT FOR INFRINGEMENT—

ALLEGATION OF UNLAWFUL CONSPIRACY.—It is no defense to a suit for infringement of a patent that the complainant and third persons have entered into an illegal combination or conspiracy in restraint of trade; and such defense is not aided by an allegation in the answer that the suit is not brought in good faith to prevent infringement, but for the purpose of making such conspiracy effective.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. § 21.]

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In Equity. Suit by the Motion Picture Patents Company against Isaac W. Ullman, Sidney M. Ullman, Duff C. Law, William Paley, [175] and the Film Import & Trading Company. On exception to answer. Exception sustained.

Richard N. Dyer and Leonard H. Dyer, for complainant.

Littlefield and Littlefield, for defendants.

HOLT, District Judge.

I think the great weight of authority is to the effect that it is no defense to a suit for the infringement of a patent that the complainant and third parties have entered into a combination or conspiracy in restraint of trade, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). *Strait v. National Harrow Co.* (C. C.) 51 Fed. 819; *Otis Elevator Co. v. Geiger* (C. C.) 107 Fed. 131; *General Electric Co. v. Wise* (C. C.) 119 Fed. 922; *Independent Baking Powder Co. v. Boorman* (C. C.) 130 Fed. 726; *Motion Picture Patents Co. v. Laemmle* (C. C.) 178 Fed. 104. Such a suit is not based on contract, but on tort, and, of course, the fact that a man has entered into some illegal contract does not authorize others to injure him with impunity.

The paragraph of the answer excepted to alleges that the suit is not brought in good faith to prevent infringement, but for the purpose of carrying out and making effective a contract, combination, and conspiracy between the complainant and the Eastman Kodak Company to monopolize the manufacture, sale, and use of moving pictures in violation of the Sherman Act. But the bill is a simple bill for the infringement of a patent. Its purpose is apparent on its face. The mere assertion that it has some other purpose is not an allegation of fact, and is not admitted by the exception. If incidentally it effects some other result, that does not authorize infringement.

My conclusion is that the exception should be sustained.

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[592] UNITED STATES v. AMERICAN NAVAL STORES CO. ET AL.*

(Circuit Court, S. D. Georgia, E. D. April 17, 1903.)

[186 Fed. Rep. 592.]

MONOPOLIES (§ 10)—FEDERAL ANTI-TRUST ACT—PENAL PROVISIONS—CONSTITUTIONALITY.—The penal provisions of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), making it a misdemeanor to engage in any combination or conspiracy in restraint of interstate commerce or to monopolize or attempt to monopolize any part of such commerce, are constitutional.^b

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 10.]

MONOPOLIES (§ 31)—FEDERAL ANTI-TRUST ACT—INDICTMENT FOR VIOLATION—SUFFICIENCY.—Counts of an indictment charging conspiracy to restrain and monopolize interstate trade and commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), considered, and held to sufficiently charge and describe the offense.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 31.]

INDICTMENT AND INFORMATION (§ 125)—DUPLICITY—VIOLATION OF FEDERAL ANTI-TRUST ACT.—Under Sherman Anti-Trust Act July 2, 1890, c. 647, § 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which makes it a misdemeanor to "monopolize or attempt to monopolize * * * any part of the trade or commerce among the several states or with foreign nations," monopolizing and attempting to monopolize such commerce are separate offenses and cannot be included in one count of an indictment.

[Ed. Note.—For other cases, see Indictment and Information, Dec. Dig. § 125.]

[593] Criminal prosecution by the United States against the American Naval Stores Company, Edmund S. Nash, and others. On demurrer to indictment. Overruled.

See, also, 172 Fed. 455; 186 Fed. 81.

Alexander Akerman, Asst. U. S. Atty., *W. M. Toomer*, Asst. Atty. Gen., for the United States.

W. W. Mackall, *Adams* and *Adams*, and *Garrard* and *Meldrim*, for defendants.

* For charge given to the jury (172 Fed. 455) see vol. 3, p. 679.

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SHEPPARD, District Judge (orally).

The demurrer to the indictment in this case raises both the question of the validity of the penal provisions of the Sherman or Anti-Trust Act and the sufficiency of the indictment under sections 1 and 2 of said act. Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). The questions raised by the demurrer, and so exhaustively and comprehensively argued by counsel, orally and by brief, have caused anxious and earnest investigation by the court. The statute has been a vexatious one to the courts since it first came under judicial scrutiny, in *Re Greene* (C. C.) 52 Fed. 104.

Four times, so far as my investigation has disclosed, this statute has received judicial consideration in criminal cases, and in none of these, was the question of the uncertainty and indefiniteness of the penal provisions of the statutes brought squarely before a court as here. Not once has the Supreme Court passed upon this, perhaps, doubtful feature of the act; but a fair and reasonable interpretation of the decisions of that court from *United States v. E. O. Knight Co.*, in 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, as early as 1895, down to the *Danbury Hat case*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, will uphold the validity of the act. A brief summary of them all is that they hold "that the act prohibits any combination whatever to procure action which essentially obstructs the free flow of commerce between the states or obstructs in that regard the liberty of a trader to engage in business." It does not fail to interest the inquiring student, either, that, in all of the important cases involving the construction of this act by that great court, every section of it has been persistently assailed for uncertainty, ambiguity, absurdity, and unconstitutionality.

The wholesome purpose of the law, as remedial legislation, is I conceive, no longer open to question or cavil by the inferior federal courts, who must, of course, be guided by the construction of the Supreme Court. Said Justice Lacombe, speaking for the Circuit Court for the Southern Dis-

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trict of New York, in *United States v. American Tobacco Co.*, 164 Fed. 700, referring to the Sherman Act:

"Disregarding various dicta, and following the several propositions which have been approved by successive majorities of the Supreme Court, this language, as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small.

"As thus construed, the statute is revolutionary; by this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which [594] might in one way or another interfere to suppress or check the full, free, and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very life of trade, it would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not a majority, of the community, and that it intended to secure such competition against the operation of natural laws."

It could accomplish no good purpose, as I see at this time, to enter upon a comprehensive review and comparison of the decisions of the inferior federal courts construing the penal provisions of the act. Suffice it to say, that the well-reasoned case decided by Judge Jackson (which I would be inclined to follow if the statute had not received construction by the Supreme Court), who undertook to define the scope of the act and what were criminal monopolies, and what constituted restraint of trade and the sufficiency of an indictment within the purview of the statute, was long prior to the decisions of the Supreme Court in the *Swift case*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and the *Joint Traffic Association case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259). In view of the interpretation of the statute made in these cases it is not improbable that Judge Jackson's decision in *Re Greene* (C. C.) 52 Fed. 104, and Judge Nelson's decision in *United States v. Greenhut* (D. C.) 50 Fed. 469, and Judge Rick's in *Re Corning* (D. C.) 51 Fed. 205, would be different.

In so far as the application of the provisions of the statute denouncing as criminal combinations and conspiracies in

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restraint of trade and monopolies and attempts at monopolies and attempts to monopolize, I am impelled, after some hesitancy and much inquiry, to the ultimate conclusion that until that question is brought squarely before the Supreme Court it would be safer to follow the precedents established by *United States v. Patterson et al.* (C. C.) 55 Fed. 605, and *United States v. MacAndrews, Forbes Company* (C. C.) 149 Fed. 823.

Judge Hough, of the Southern District of New York, overruled a demurrer to an indictment, charging violation of sections 1 and 2 of the Sherman Act, and held among other definitions of the act, that:

"Whether any given business scheme falls within the anti-trust law as a combination or conspiracy in restraint of trade, or an attempt at monopoly of a portion thereof, it is to be determined by its effect on interstate commerce, which need not be a total suppression of trade or interstate commerce, nor a monopoly; but it is sufficient if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantages flowing from free competition."

Again, the criminal provisions of the statute received comprehensive treatment from Circuit Judge Putnam, in the case of *United States v. Patterson* (C. C.) 55 Fed. 605. This case was most exhaustively argued by counsel in which almost every conceivable objection that could be raised to the application of the first two sections of the act were insisted upon, yet the learned judge said:

"I do not think there is any constitutional question in this case, upon any view of this statute or upon the face of the indictment.

"The right of free commerce granted by the Constitution permits broad legislation; and in no sense is this statute as broad as the revised statute [595] section 5508 on the principal construction pleaded later in *United States v. Weddell* [112 U. S. 76, 5 Sup. Ct. 85, 28 L. Ed. 673].

"There may be practical difficulties in applying the statute in such a way as to prevent conflicts with the state jurisdiction. Ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is necessary, ordinarily, to declare the means by which it is intended to engross or monopolize the market."

The court does not feel embarrassed by the use of the words "trade and commerce." The learned judge goes on to point out the specific offenses denounced by the first two sections

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of the act, and further on defines the purpose of Congress in this legislation.

Can it be said in view of these decisions that the act, as far as it applies to criminal combinations and conspiracies, should be lightly brushed aside because of its apparent unreasonableness and absurdity, or would it best comport with the due administration of justice to hold its penal provisions effective as against those conspiracies and combinations which are shown by requisite proof to be destructive of the public welfare? It has been asserted by text-writers to be incapable of enforcement because its application would destroy honest enterprise and thrift; perhaps this is an unfounded apprehension.

There are valid statutes impossible of application in all cases to the letter, notably the *Trinity Church case*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. Blackstone illustrates it, with the law of Bologna, which prohibited the shedding of blood in the streets of the city; but, when a man fell with a fit and had to be lanced as a remedy, no one ever thought by doing so, that the law was violated.

I have considered the indictment in the light of the constitutional requirement that the accused must be informed of the nature and cause of the accusation against him, and the indictment must impart to him, not only all the elements of the offense, but they must be stated in the indictment with clearness and certainty, so as to make the defendant reasonably to understand the act and particular transaction touching which he must be prepared with his proof. The rule is, in prosecutions for offenses against the laws of the United States, the indictment must charge more than the language of the statute upon which it is founded. However, it appears that to some extent this necessity must be governed by the particular facts and circumstances of each case.

It has been held that the test of the sufficiency of the charging or descriptive part of an indictment is not that it might be more specific and certain, but whether it charges enough to put the defendant on notice of what he may expect to meet in the proof. Without critically reviewing the indictment, the first count charges that the defendant conspired in the usual form of a conspiracy charge, and then

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proceeds to describe with some detail how they were engaged in interstate trade and commerce and the character of the trade points and places, the relation of the officers to the corporation, and then follows a description of the means and ways of effecting the conspiracy.

The second count charges a conspiracy to monopolize and describes in like manner how the monopoly was to be effected, and the general scheme of effecting the objects of that conspiracy. I am of the opinion that these counts charge sufficiently the offense of conspiracy to [596] put the defendant on notice of the nature of the accusation. The third count is a more difficult proposition. It is very doubtful whether by the use of the generic term "monopolize" and what follows as a description of the offense in this count is sufficient to meet the requirements as laid down in the familiar cases of *Cruikshank* (92 U. S. 542, 23 L. Ed. 588) and *Hees* (124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516). As may be seen, the statute intends to create two distinct and different offenses, viz., monopolizing and attempting to monopolize.

It is elementary that two separate offenses cannot be included in one count of an indictment. Besides, it is important that the defendant should know whether the government will proceed to prove that the defendants monopolized or attempted to monopolize. I think there is clearly a distinction between the two, and, although there is not different punishment provided, the count is bad for duplicity and for lack of certainty.

[1002] UNITED STATES v. SWIFT ET AL.*

(District Court, N. D. Illinois. March 22, 1911.)

[188 Fed. Rep., 1002.]

CRIMINAL LAW (§ 42)—IMMUNITY TO ONE FURNISHING EVIDENCE—
STATUTE GOVERNING INVESTIGATIONS BY COMMISSIONER OF CORPORATIONS.—The immunity statute governing the giving of testimony before the Commissioner of Corporations is Act Feb. 11, 1893, c. 83, 27

* For opinion overruling demurrers to indictments (188 Fed. Rep., 92), see *post*, p. 283.

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Stat. 443 (U. S. Comp. St. 1901, p. 3173), ~~expressly made applicable~~ by Act Feb. 14, 1903, c. 552, § 6, 22 Stat. 827 (U. S. Comp. St. Supp. 1909, p. 92), creating the Department of Commerce and Labor.*

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.]

CRIMINAL LAW (§ 42)—IMMUNITY TO WITNESS—CONSTRUCTION OF STATUTE.—Immunity Act Feb. 11, 1893, c. 83, 27 Stat. 443 (U. S. Comp. St. 1901, p. 3173), which relates to evidence given in government investigations, and provides that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, * * *" was enacted to satisfy the demand of the fifth constitutional amendment, and does so by affording the witness absolute immunity from future prosecution for any offense arising out of the transactions to which his testimony relates, and which might be aided, directly or indirectly, thereby, so as to leave no ground on which the constitutional privilege [1003] may be invoked. It operates as an act of general amnesty for all such offenses; but it is not intended to be, and cannot be made, a shield against prosecution for offenses committed after the testimony is given or the evidence furnished, since a person cannot be said to have been a witness against himself in respect to an offense which had not been committed when the testimony was given.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.]

CRIMINAL LAW (§ 198)—FEDERAL ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF TRADE—ACQUITTAL—EFFECT.—A conspiracy to restrain or monopolize interstate commerce, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), is necessarily a continuing one, and its illegality is not alone in the act of confederating or engaging in the conspiracy, but also in its continuation, so that a judgment of conviction or acquittal in a prosecution of those engaged in it is not a bar to their subsequent prosecution for continuing and carrying forward the same conspiracy thereafter, which is a new violation of the law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 198.]

CRIMINAL LAW (§ 42)—IMMUNITY TO ONE FURNISHING EVIDENCE—EFFECT OF STATUTE.—Defendants were indicted in 1905 for conspiracy to monopolize interstate commerce in fresh meats, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); but an acquittal was directed, on the ground that they were immune from prosecution because of testimony given and evidence furnished by them before the Commissioner of Corporations in relation to the transactions which formed the basis for the indictments. *Held*, that such immunity did not extend to a subsequent prosecution for continuing the same

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conspiracy thereafter, nor did it obliterate the facts testified to, which, if legally competent and relevant, might be shown in the subsequent prosecution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.]
INDICTMENT AND INFORMATION (§ 137).—MOTION TO QUASH.—**GROUND—**
COMPETENCY OF EVIDENCE BEFORE GRAND JURY.—Except in states having statutes on the subject, courts will not review the evidence received by a grand jury on a motion to quash, for the purpose of passing on its competency.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 483; Dec. Dig. § 137.]

CRIMINAL LAW (§ 278).—PLEAS IN ABATEMENT.—**GROUND.**—In the federal courts, a plea in abatement in a criminal case may properly raise an issue of fact as to what evidence was presented to the grand jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 633-642; Dec. Dig. § 278.]

WORDS AND PHRASES.—“IMMUNITY.”—“Immunity” does not mean that no acts in fact were ever done, but that there may be no prosecution in respect thereto. Immunity does not wipe out the history of events.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3411, 3412.]

PARDON (§ 1).—NATURE OF “PARDON.”—“AMNESTY.”—A “pardon” or “amnesty” secures against the consequences of one's acts, and not against the acts of themselves. It involves forgiveness; not forgetfulness.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 1; Dec. Dig. § 1.]

For other definitions, see Words and Phrases, vol. 1, p. 373; vol. 6, pp. 5163-5172; vol. 8, p. 7743.]

[1094] Criminal prosecution by the United States against Louis F. Swift and others. On motions to quash and pleas to the indictment, and motion to strike pleas from files. Motions to quash and to strike denied, and rule on government to reply to pleas.

“The indictment in this case charges a combination in restraint of trade and commerce among the several states, and contains five counts. The first, second, and fifth counts charge the engaging by the defendants in the combination therein described ‘during the ten years next preceding the finding and presentation of this indictment, * * * and therefore continuously and at all times during the three years next preceding the finding and presentation of this indictment.’ The fourth count charges the engaging in a similar

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combination 'at all times during the three years next preceding the finding and presentation of this indictment,' and, further, that 'during all the times mentioned in this indictment said defendants, together with other persons whose names are to the jurors unknown, have maintained and made effective an agreement, understanding, and arrangement among themselves whereby they have fixed, regulated, and controlled the prices,' etc. The third count charges the engaging in such a combination 'continuously and at all times during the three years next preceding the finding and presentation of this indictment,' without any subsequent qualifying words as to time.

"The separate pleas in abatement filed on behalf of the respective defendants are of two classes: (A) Pleas of those defendants who were impleaded in the indictment of July 1, 1905; (B) pleas of those defendants who were not impleaded in the indictment of 1905. The defendants in this case who were formerly indicted, and whose pleas here are identical, are Louis F. Swift, Edward F. Swift, Charles H. Swift, J. Ogden Armour, Arthur Meeker, Thomas J. Connors, and Edward Morris. Seven separate pleas in abatement have been filed on behalf of each of these defendants.

"The first plea is directed at the first count of the indictment. It sets out verbatim the first and seventh counts of an indictment returned on July 1, 1905; the special pleas in bar filed October 23, 1905, by each of those defendants to the former indictment, including the first and seventh counts thereof; the additional special pleas in bar filed on November 22, 1905, to the former indictment; the replications to those special pleas; the verdict of the jury sustaining the special pleas, rendered on March 21, 1906; the judgment on that verdict, entered on March 29, 1906, in favor of those defendants. The plea then sets out certain evidence of and concerning the matters and things heard and considered by the grand jury which returned the indictment of July 1, 1905, and which it avers was also heard by the grand jury which returned the indictment herein; that there was no evidence presented to the grand jury which returned this indictment, of and concerning the engaging by these defendants in the combination described in the first count, other than evidence of and concerning the acts, transactions, matters, and things charged in the indictment of July 1, 1905; that the acts, transactions, matters, and things which are stated and charged in the first count of this indictment are the same acts, transactions, matters, and things which were stated and charged in the first and seventh counts of the indictment of July 1, 1905; that the evidence described was material to the charges contained in the first count of this indictment, and that the consideration of the same by the grand jury was prejudicial to the defendants. The plea closes with averments of diligence.

"The second, third, and fourth pleas are identical with the first, save only that they are directed at, respectively, the second, fourth, and fifth counts of this indictment.

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"The fifth plea responds to the entire indictment. In it is incorporated, by reference, the record fully set out in the first plea, and the averments of diligence. It also avers that after the making of the investigation by the Commissioner of Corporations, as described fully in the special pleas in bar filed to the indictment of July 1, 1905, the Commissioner of Corporations reported the information and data so gathered by him to the President of [1905] the United States, and embodied in the printed volume known as the 'Garfield Report,' a part of the information obtained from the several defendants; that the Garfield Report is a public document, which is incorporated by reference; that in 1904 and 1905 the Garfield Report and the information and evidence secured from the defendants were delivered to the Attorney General of the United States and to the district attorney for the Northern district of Illinois; and upon information and belief that the Garfield Report and the evidence secured from the several defendants were used by the attorneys for the United States in this proceeding in preparing and searching out evidence against the defendants, which was introduced before and considered by the grand jury returning this indictment; that such evidence, so searched out and prepared with the use and aid of the evidence so secured from the several defendants, which was introduced before the grand jury returning this indictment, was material evidence, and prejudicial to the defendants.

"The sixth plea also responds to the entire indictment. The record of the 1905 proceedings set out in the first plea, and the averments of diligence, were also incorporated by reference. In addition it avers that the attorneys for the United States submitted to the grand jury which returned this indictment evidence of and concerning the acts, transactions, matters, and things respecting which the several defendants had previously produced evidence before the Commissioner of Corporations in the course of his investigation, referred to and described in the record of the former proceedings, and respecting which acts, transactions, matters and things the several defendants had become immune from prosecution, as adjudged in the former proceeding; that evidence of and concerning such acts, transactions, matters, and things, respecting which the several defendants were immune, was used by the attorneys for the United States and by the grand jury in preparing and searching out other evidence against the defendants, and the evidence so prepared and searched out was used before and considered by the grand jury; and that such evidence was material and its use prejudicial. Certain portions of the evidence respecting immune transactions was then described, namely, certain corporate records and the testimony of several witnesses, and the averment that such evidence was considered by the grand jury.

"The seventh plea also responds to the entire indictment. The 1905 proceedings set out in the first plea, and the averments of diligence were there incorporated by reference. It is also averred that the grand jury which returned this indictment heard evidence which was

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of and concerning the acts, transactions, matters, and things charged in the indictment of July 1, 1905, and on account of which the several defendants had been adjudged to be immune from prosecution. It describes, also, certain corporate records and the testimony of certain witnesses, which was heard and considered by the grand jury returning the indictment of July 1, 1905, with the averment that it was also heard and considered by the grand jury which returned this indictment. It avers that such evidence was material and prejudicial, and that there was no evidence presented to the grand jury of and concerning the engaging by these defendants in the supposed combination in the indictment herein charged, other than evidence of and concerning the acts, transactions, matters, and things charged in the indictment of July 1, 1905.

"Identical motions to quash have been filed on behalf of each of the defendants on whose behalf were presented the foregoing pleas in abatement, and therein is set forth the record of this former proceeding, incorporated by reference to the first plea in abatement; that the attorneys for the United States presented to, and the grand jury returning this indictment heard and considered, evidence respecting the same acts, transactions, matters, and things concerning which the respective defendants had theretofore produced evidence before the Commissioner of Corporations; that the grand jury returning this indictment heard evidence of and concerning the same acts, transactions, matters, and things respecting which evidence had been heard and considered by the grand jury which returned the indictment of July 1, 1905, and as to all of which immunity from further prosecution had been adjudged. Certain portions of such evidence were described, namely, corporate records and the testimony of certain witnesses. The motions state [1906] that such evidence was material and prejudicial, and that there was no evidence heard by the grand jury returning this indictment concerning the engaging by these defendants in a combination, other than evidence of and concerning acts, transactions, matters, and things stated and charged in the indictment of July 1, 1905.

"(B) Identical pleas in abatement have been filed on behalf of Edward Tilden, Francis A. Fowler, and Louis H. Heyman, defendants herein, who were not impleaded in the indictment of 1905.

"The first of these pleas avers and describes the investigation of the fresh meat industry, conducted under a resolution of the House of Representatives, by Commissioner Garfield, in 1904; that in the course of that investigation the defendants were required to furnish evidence respecting the method of business pursued in the conduct of the fresh meat business of certain of the corporations named in the present indictment; that such evidence so furnished related to several of the acts, transactions, matters, and things charged in this indictment; that on March 8, 1905, and afterwards, Commissioner Garfield reported the information and data so gathered by him to the President of the United States, and embodied a part of it in what is

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known as the 'Garfield Report,' a public document incorporated therein by reference; that in 1904 and 1905 the Garfield Report and other evidences and information secured from these defendants were delivered to the Attorney General of the United States, and to the district attorney for the Northern district of Illinois, and that the evidence so secured by the commissioner from these defendants was made use of by the attorneys for the United States in searching out other evidence against them, and which was introduced before, and heard and considered by, the grand jury which returned this indictment; that such evidence was material and prejudicial. The plea ends with an averment of diligence.

"In the second plea the three defendants aver and describe the conducting of the Garfield investigation in 1904; that the commissioner secured evidence and information from them of and concerning acts, facts, circumstances, matters, and things referred to in the present indictment as being and constituting the supposed engaging by the defendants in the unlawful combination; that thereafter the defendants could not be subjected to any penalty or forfeiture for or on account of the respective transactions, matters, and things concerning which they had so testified or produced evidence before the commissioner; that the attorneys for the United States presented to, and the grand jury which returned this indictment heard and considered, evidence of and concerning the same acts, transactions, matters, and things respecting which the defendants had produced evidence before the Commissioner of Corporations, and for and on account of which they had become and were immune from prosecution; that the evidence consisted in part of certain corporate records and the testimony of certain witnesses, who are referred to; that the attorneys for the United States and the grand jury which returned this indictment used evidence of and concerning transactions respecting which these defendants were immune from prosecution in preparing and searching out other evidence against them, and the grand jury which returned this indictment heard and considered such evidence so prepared and secured; that all of such evidence was material and prejudicial; and that the defendants were diligent in presenting the matter to the court.

"The third plea on behalf of these three defendants is identical with the second, excepting that it avers upon information and belief that there was no evidence presented to the grand jury of and concerning the engaging by the defendants in the supposed combination charged in the indictment, other than evidence of and concerning the acts, transactions, matters, and things respecting which the defendants had theretofore produced evidence before the Commissioner of Corporations, and respecting which they had thereby become and were immune from prosecution.

"Motions to quash were filed on behalf of Tilden, Fowler, and Hayman, containing statements descriptive of the Garfield investi-

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gation in 1904; that the defendants were required to furnish evidence in the course of such investigation; the compilation of the Garfield Report, which was incorporated by reference; that the report and the evidence secured from the defendants [1007] were in 1904 and 1905 obtained by the attorneys for the United States, and were used by them in preparing and searching out evidence against the defendants, all of which was introduced, heard, and considered in the investigation and proceeding before the grand jury which returned the present indictment; that the grand jury heard and considered evidence of and concerning the same acts, transactions, matters, and things respecting which evidence had been secured from the defendants by the Commissioner of Corporations in the course of his investigation, and used such evidence in preparing and searching out other evidence, which was also used and offered against the defendants; that part of the evidence consisted of corporate records and the testimony of certain witnesses; that there was no evidence presented to the grand jury of and concerning the engaging by the defendants in the supposed combination charged in the indictment, other than evidence of and concerning the acts, transactions, matters, and things respecting which the defendants had theretofore produced evidence before the Commissioner of Corporations; that the evidence used was material and prejudicial. The matters and things set forth and averred in the plea in abatement were incorporated by reference.

"The government moved to have the motions to quash the indictment denied and the pleas in abatement stricken from the files. The defendants asked to have the motions to quash sustained, or for a rule on the government to reply within a short day to the pleas in abatement."

Geo. W. Wickersham, Atty. Gen., Edwin W. Sims, U. S. Atty., and Wm. S. Kenyon, James H. Wilkerson, Pierce Butler, James M. Sheehan, Oliver E. Pagan, Elwood G. Godman, and Barton Corneau, for the United States.

John S. Miller, Moritz Rosenthal, Levy Mayer, George T. Buckingham, M. W. Borders, Albert Veeder, Ralph Crews, Alfred R. Union, and Henry Veeder, for defendants.

CARPENTER, District Judge (after stating the facts as above).

The broad question before the court for decision is the same, whether raised by the motions to quash or by the pleas in abatement; and inasmuch as the government's motion to strike the pleas in abatement from the files involves certain

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technical questions of criminal procedure, I shall dispose first of the motions to quash.

Stripped of all unessentials, the case is this: In 1904 all of the defendants gave information and evidence (whether under compulsion or not is immaterial, so far as the present investigation is concerned) to the Commissioner of Corporations, an officer in the Department of Commerce and Labor. What that information and evidence was we are not now informed, but may assume that it related to interstate commerce in the fresh meat industry. In 1905 a federal grand jury in this district indicted the defendants (except Tilden, Fowler, and Heyman), under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), for combining and conspiring together in restraint of trade and commerce in fresh meat among the several states. Special pleas in bar were interposed averring that the information and evidence given by the defendants to Commissioner Garfield had been turned over to the Department of Justice, and by it presented to the grand jury, which returned a true bill based thereon, and that the defendants, by reason of having given the information and evidence, were immune from prosecution concerning the transactions, matters, and things about which they had testified or [1008] furnished evidence. Issue was joined on those pleas, and on March 21, 1905, a jury, by direction of the district judge, rendered a verdict of not guilty. Subsequently judgment was entered on that verdict.

In September, 1910, a federal grand jury returned an indictment against all of the defendants, charging them, in violation of the Sherman Act, with combining and confederating together in restraint of trade in fresh meat between the several states, etc., for the "past ten years," and "continuously and at all times during the three years next preceding the finding and presentation of this indictment."

By motions to quash this indictment, and by pleas in abatement (identical as to pertinent facts), the defendants make the issue that by having given information and evidence to the Commissioner of Corporations in 1904 they became immune from prosecution in 1905, as was determined by a

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judgment of record in this court, and that the "immunity statute in question forbids, not only their indictment for or on account of the transactions, matters, and things for which they are immune, but also the use of the immune transactions in aid of a prosecution for a continuation of the immune offense," and that "the inclusion of such immune transactions in the (present) indictment is a violation of their rights under the fifth amendment to the federal Constitution and the immunity statute."

The motions state and the pleas aver that no evidence was presented to the grand jury which returned the present indictment, except of the transactions, matters, and things concerning which the defendants gave information to the Commissioner of Corporations in 1904, and concerning which they have been adjudged to be immune from prosecution.

In short, the question now presented is: Assuming that the defendants informed the Commissioner in 1904 that they were conspiring or combining together in violation of the Sherman Act, was the immunity granted to them by the statute, and by the judgment of this court, so perfect that they may continue indefinitely in their unlawful undertaking?

1. The pertinent immunity act is that of February 11, 1893 (27 Stat. 443 [U. S. Comp. St. 1901, p. 3173]), which provides:

"That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise." etc.

The provisions of the appropriation act of February 25, 1903 (32 Stat. 854, 908, c. 755), urged by defendants' counsel to be involved, have no bearing upon the question, because they claim to have received immunity by virtue of testimony given in an investigation carried on by the Commissioner of Corporations, and the immunity provision of the act of February 25, 1903, applies only to causes arising under

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(1) the act to regulate commerce (Act Feb. 4, 1887, c. 104, [1609] 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]); (2) the Sherman Act; and (3) the customs act (Act June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886]).

The act making the provisions of the statute of February 11, 1893, applicable to investigations conducted by the Bureau of Corporations is the act of February 14, 1903 (32 Stat. 825 [U. S. Comp. St. Supp. 1909, p. 87]), establishing the Department of Commerce and Labor, section 6 of which provides that the provisions of the act of February 11, 1893, shall apply to witnesses subpoenaed by the Commissioner of Corporations.

2. It seems necessary at the outset to consider the scope of the constitutional protection and the character and scope of the protection necessary to be afforded in immunity acts, in order to supplant the constitutional privilege. The fifth amendment to the Constitution provides:

"Nor shall any person be compelled in any criminal case to be a witness against himself."

The first statute of immunity offered as the equivalent of the constitutional shield was the act of February 25, 1868 (15 Stat. 87, c. 13). This statute later was re-enacted into section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661), in the following language:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying, as aforesaid."

Section 860 was before the Supreme Court of the United States in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, and was held to afford an insufficient compensation for the privilege granted by the fifth amendment. The court said:

"We are clearly of the opinion that no statute, which leaves the party or witness subject to prosecution after he answers the incrimi-

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nating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment to be valid must afford absolute immunity against future prosecutions for the offense to which the question relates."

To meet the requirements of the rule thus laid down by the Supreme Court, the act of February 11, 1893, was passed, providing that:

"No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise," etc.

In this form the matter was presented in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, where a majority of the court held, after quoting extensively from the opinion in *Counselman v. Hitchcock*:

[1010] "The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments, then as he must necessarily, to a large extent, determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency, * * * the practical result will be that no one could be compelled to testify to a material fact in a criminal case unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution which might be aided, directly or indirectly, by his disclosure, then if no such prosecution be possible—in other words, if his testimony operated as a complete pardon for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question. * * *

"Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and therefore constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for or in aid of a criminal prosecution against the witness, the rule ceases to apply; its object being to protect the witness himself, and no one else—much

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less that it shall be made use of as a pretext for securing immunity to others. * * *

"The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon, either in England or in this country. Although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this court in *Ex parte Garland*, 4 Wall. 333, 390 [18 L. Ed. 306], 'it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. * * *

"* * * Amnesty is defined by lexicographers to be an act of the sovereign power granting oblivion or a general pardon for a past offense, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons who are subject to trial, but have not yet been convicted. * * *

"It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but as we have already observed the authorities are numerous and very nearly uniform to the effect that if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other."

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[1011] In *Hale v. Henkel*, 201 U. S. 43, at page 67, 26 Sup. Ct. 370, at page 376, 50 L. Ed. 652, the court said:

"The interdiction of the fifth amendment operates only when a witness is asked to incriminate himself—in other words to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present not a past criminality, which lingers only as a memory, and involves no present danger of prosecution. * * * The extent of this immunity was fully considered by this court in *Counselman v. Hitchcock*, 142 U. S. 547 [12 Sup. Ct. 195, 35 L. Ed. 1110], in which the immunity offered by Rev. Stat. § 890, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission, in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in *Brown v. Walker*, 161 U. S. 591 [16 Sup. Ct. 644, 40 L. Ed. 819], to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in *Counselman v. Hitchcock*, 142 U. S. 589 [12 Sup. Ct. 195, 35 L. Ed. 1110], that 'a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.'"

An analysis of the three cases just quoted from shows that there is no such thing as a constitutional right of absolute silence in all cases. The constitutional right is limited to those cases only in which speech would incriminate, and it follows that if the answer to the question cannot tend in any way to incriminate the witness, because liability to prosecution on account of anything about which he may testify has been removed, there is no ground on which the constitutional privilege can be invoked. The immunity act gives no substitute for this constitutional privilege. The privilege continues to exist to its fullest extent in any case in which the answer may tend to incriminate. The Congress of the United States had no power to take away the privilege, to abridge it, or to substitute anything for it. The most that Congress could do was to remove any criminality which might result from the answering of the question or the giving of the evidence. When that was done, the situation became such that the constitutional privilege did not apply, and could not be relied upon. It became, so far as the wit-

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ness was concerned, as though his acts never had been criminal, and as though his testimony under no circumstances could incriminate him.

As to the claim that the immunity is for the future as well as in the past, it may be observed that in *Brown v. Walker*, *supra*, the court said:

"If, upon the other hand, the object of the provision [the fifth amendment] be to secure the witness against a criminal prosecution which might be aided, directly or indirectly, by his disclosure, then if no such prosecution be possible—in other words, if his testimony operated as a complete pardon for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question."

The words "complete pardon for the offense to which it relates" indicate clearly that there must have been some violation of the law at the time the evidence was given. In *Hale v. Henkel*, *supra*, the court said:

[1012] "But, if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past, criminality, which lingers only as a memory and involves no danger of prosecution."

If the amendment does not apply to a past criminality, which lingers only as a memory, a fortiori it cannot apply to future criminality, not yet conceived in the minds of the parties. In the *Counselman case*, *supra*, the court said:

"In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

A question put to a witness cannot relate to something which does not exist. As to all crimes committed at the time the information was had from the defendants, there may have been immunity. It cannot be claimed now as to crimes which had not then been committed, or even contemplated. That this is true follows conclusively from the fact that the constitutional privilege guards only against the giving of incriminating evidence. Incriminating evidence cannot be given, unless a crime in fact has been committed.

What were the offenses here to which the "questions related"? Obviously, if the present indictment contemplates a crime supposed to have been committed within three years

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prior to its return (and it is clear that it does), then the old immune evidence did not and could not relate to the offense charged.

The claim of the defendants is, as I have analyzed the arguments of their counsel, that as to the matters, transactions, and things about which they testified in 1904, and as to everything related thereto or resulting therefrom, there can be no prosecution in 1910. I do not decide, and it is not necessary for me to decide, the same question which was presented to Judge Humphrey in 1905. *United States v. Armour* (D. C.) 142 Fed. 808. What I must decide is whether, granting that the defendants were entitled to immunity from prosecution for any crime committed at the time they testified before Commissioner Garfield, they are now immune, and forever will be immune, from prosecution for any acts concerning, or discovered by reason of, the matters, transactions, and things about which they then testified.

8. It may be well to consider what is meant by a conspiracy or combination, as defined in the Sherman Act. At common law the existence of the conspiracy agreement or confederation constituted the crime, without even a single overt act in pursuance of it. *Bannon et al. v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494. The gist of the offense, therefore, is the fact of confederating. Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676) has not altered the nature of the offense, or the rules of law governing it, save in one particular, namely, that the conspiracy may not now be prosecuted until one overt act has been committed. Section 5440 gives a locus poenitentiae until the commission of some overt act. After the commission of such overt act, the law of conspiracy is unaffected by that section. *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, [1013] 27 L. Ed. 698; *Bannon et al. v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

If, then, a conspiracy is indictable at common law before any overt act, likewise it must be indictable at common law at any time after the commission of an overt act, if the con-

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spiracy agreement or confederation still exists. A conspiracy agreement to accomplish an unlawful object is, in its very nature, a continuing arrangement between the conspirators, the duration of which will depend upon the nature of the object which they propose to accomplish. Considering the infinite variety of possible conspiracies, both as to plan and purpose, it is impossible to lay down any unvarying rule concerning the extent of their duration, other than to say that they continue until they are abandoned, or the object of the conspiracy is accomplished. So long as the parties contemplate further action, if necessary to the attainment of their ultimate object, the agreement or confederation still exists. This further action may consist alone in accepting the benefits of an agreement previously made.

In *United States v. Kissel* (decided by the Supreme Court of the United States December 12, 1910) 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168, Mr. Justice Holmes said:

"A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true; but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous. The partnership may endure as one and the same partnership for years. A conspiracy is a partnership for criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the overt act of all, without any new agreement specifically directed to that act."

In *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, the contract forming the defendant association had been made before the Sherman Act was passed; but a continuance of the association after the enactment of the statute was held to be within the prohibition. Mr. Justice Peckham said:

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract, at the time it

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was entered into, was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of any act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was entered into, the continuation of the agreement, after it had been declared to be illegal, became a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely [1014] distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise."

In *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the court, under the Sherman Act, restrained a continuance of a combination already formed. This must have been because such continuance was as much condemned by the act as its original formation.

In *United States v. MacAndrews* (C. C.) 149 Fed. 823, Judge Hough, in overruling a demurrer to an indictment charging a violation of sections 1 and 2 of the Sherman Act, said:

"It is true that the gist of the alleged offense is the combination or the attempt at monopoly, but it is not true that the offenses are complete when the combination is mentally formed or the mental intention to monopolize arises. The statutory offense, and the one charged herein, does not depend upon 'a single agreement, but [on] a course of conduct intended to be continued'; yet, nevertheless, 'the thing done and intended to be done is perfectly definite.' *Swift v. United States*, 196 U. S. 400 [25 Sup. Ct. 276, 49 L. Ed. 518]. That case arose on the civil side of the court; but it is to be remembered that the same facts and acts which expose violators of this statute to civil suits also render them subject to indictment. In this case, while the time is indefinite, the thing done is definite, and that is all that the statute requires.

"To show that an exact time may be, and therefore must be, assigned for the commission of the offense of combination, the defendants argue upon the meaning of the word 'engage' as used in the statute,

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and strenuously urge that, since the offense prohibited is that of 'engaging in' a combination, it must be complete as soon as the accused employs his attention or effort in or about the same, that such employment of attention or effort is capable of precise assignment in point of time, and they challenge the prosecution to name the day.

"The statute is not directed against such an abstraction as this. It does not require on the part of the prosecution clairvoyance to discover or locate the offense. Its prohibition is not directed against a state of mind, but against a state of facts. The facts do not simultaneously occur; the events are not contemporaneous. It may, and naturally would, require time for the working parts of the combination to become co-operative, or for the monopoly to become more than a hope; and what is forbidden and renders the actors obnoxious to the criminal law is not an undiscoverable thought or hope, but a perfectly obvious result or condition. The condition or state of facts against which the statute is directed is a continuing condition, and therefore the offense of creating and maintaining that condition is necessarily a continuing offense, and does not, from its very nature, require greater particularity in assignment than is used in this indictment."

The books say sometimes that each overt act "renews" the conspiracy. This can be true only in the sense that the overt act constitutes renewed or further evidence of the continued existence of the conspiracy. A conspiracy is always required to support the overt act. A conspiracy agreement commonly continues in actual existence until after the object of the conspiracy has been accomplished. Its actual continuance always is a question of fact, and the indictment in this case charges a continued actual existence of the conspiracy from its inception in 1904, up to the time of the return of the indictment.

Is the original confederation or unlawful agreement the only violation of the statute, or is a continuation or carrying out of that agree[1015]ment, evidenced by a conscious participation therein by the parties, equally a violation of the law? The fact that conspiracies generally may be, and usually are, continuing agreements or understandings, emphatically is true of conspiracies to restrain or to monopolize commerce. In such cases, not only may the conspiracy endure, as in the case of conspiracies generally, until a single complete result is effected, but the result intended by the conspirators is itself, quite inevitably, a continuing condition of

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things. Restraint or monopolization of commerce for a moment or a day is not the object of a conspiracy to restrain or monopolize it. The conspirators seek continuous restraint and monopolization.

The argument of the defendants is that the crime of conspiracy is non-continuing, because the essential element of the offense is the act of confederating or plotting, which is in itself inherently a non-continuing act. The authorities which have just been cited are to the contrary. The question of the continuous or non-continuous nature of a conspiracy depends entirely upon the agreement of the parties and the object to be effected. It is always possible that the conspiracy or confederation itself may contemplate a continuous course of action on the part of those engaged in it. An agreement to pursue an illegal course for 10 or 15 years, by its very nature, would be an agreement which was continuous. Take a concrete case. Assume that the defendants in 1904 entered into a written agreement to stifle competition, or to control prices, in the fresh meat industry through the medium of the National Packing Company. Would indictment and conviction in 1905 have given them an everlasting license to continue their unlawful acts, exempt and immune from prosecution?

4. It must be conceded that, had the defendants been convicted in 1905, no question of immunity arising, no further prosecution could be had for the same offense. If, however, the conspiracy having been entered into and the various media through which it was to be made operative and effective having been created, all in 1904, proof of the facts upon which the former conviction was had (properly safeguarded by the rules of evidence) could be shown in a prosecution instituted in 1910, based upon a continuous conscious participation by the defendants in the original undertaking; that is to say, the continued operation of the unlawful combination, notwithstanding the former conviction, is in itself a new violation of the law. The indictments in this case are not for any crime committed at the time the privileged evidence was given, but for a subsequent crime, and that subsequent crime consists in the continuation of the original agreement.

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Again, suppose in 1904 the defendants admitted to the Commissioner of Corporations that they had conspired together to restrain the fresh meat trade in this country. Suppose that the confession were used to search out other evidence tending to show that the conspiracy organized in 1904 had been in continuous operation up to and including the month of September, 1910. Can they stand boldly upon the proposition that with respect to those matters, transactions, and things which they had confessed they are immune for all time to [1016] come? Not only immune from punishment concerning the things of the past which they disclosed, but immune from punishment for continuing in their unlawful engagement? Not only that, but immune from the use of the evidence against them for any purpose at any time thereafter?

Immunity does not mean license. If it does, then one need only to confess his crime, and his license to violate the law becomes perpetual. Any consideration of the so-called immunity or constitutional privilege which results in the giving of license to continue an unlawful act, or immunity from prosecution for future crime, would be intolerable.

The defendants must rest squarely upon the proposition that the immunity granted by the statute is broader than the privilege of the Constitution. However, both the Constitution and the immunity statute apply only to incriminating evidence; the former by construction given by the Supreme Court of the United States, and the latter by its very terms.

I cannot agree that the immunity act purposely was made attractive as a kind of bonus or bribe to induce innocent disclosures by the promise that a future crime concerning the acts, transactions, and things testified about would pass unpunished. I do not believe that the defendants here accused are immune for all time to come from the punishment prescribed by the Sherman Act, with respect to interstate commerce in meat in this country. No matter how the arguments of counsel are analyzed, they lead ever to that result. It must follow, if their position is sound, that a general statement of one's business made to the Commissioner of Commerce and Labor will prevent the government from using

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such information in any way, for the purpose of ferreting out or prosecuting future crimes connected with that business.

The defendants claim, also, that the use of privileged or immune evidence before the 1910 grand jury was a violation of their constitutional rights; that the evidence was itself "unconstitutional," as distinguished from "incompetent"; that the immunity or amnesty or pardon afforded by the fifth amendment and the immunity act obliterated the acts themselves about which they had furnished evidence to Garfield. In this connection, much stress has been laid upon cases involving pardons. It is urged that:

"The legal effect of the pardon or amnesty (the same thing) is to wholly obliterate the offense, and all its consequences; to furnish a legal equivalent for conclusive proof that the pardoned acts never existed."

In other words, after a pardon, there is "oblivion" as to the past. If, however, there be any "oblivion," it is not as to the actual happening of things, but as to the attending consequences. Amnesty or pardon obliterates the offense, it is true, at least to such extent that for all legal purposes the one-time offender is to be relieved in the future from all its results; but it does not obliterate the acts themselves. It puts the offender in the same position as though what he had done never had been unlawful; but it does not close the judicial eye to the fact that once he had done the acts which constituted the [1017] offense, and the cases arising under the pardons and under the general amnesty granted at the close of our Civil War do not support, but, on the contrary, dispel the idea that the acts themselves, as distinguished from their penal consequences, were obliterated by pardon or amnesty. Thus in the *Garland case*, 71 U. S. 333, 18 L. Ed. 366, the sole question was whether or not Gen. Garland could be permitted to practice law in the Supreme Court when, because he had held office under the government of the Confederate States, he could not take the then required oath that he had never given aid and comfort to, or held office under, enemies of the United States. The whole controversy arose because the facts were not obliterated, because Garland could not take the oath without being guilty of perjury.

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Had the facts been obliterated, the simple way out would have been for Gen. Garland to take the oath; but it was admitted on all hands, and stated by the court, that he could not do so.

An officer in the employ of the government, overzealous, perhaps, in the performance of his duty, shoots and wounds seriously a person whom he thinks has been guilty of a crime. The officer had no authority to use violence, and was indicted and held for trial on a charge of assault with intent to kill. The executive, believing that the circumstances warranted his interference, pardons the officer. Does the pardon wipe out the physical fact that he shot and wounded seriously his victim? Does the pardon prevent the victim from recovering damages in a civil action? Clearly, it does not. Certainly it cannot be claimed that the pardon granted in 1861 to Gen. Garland for "taking part in the late rebellion against the government," etc., not only rendered him immune from punishment, but branded him a Union soldier or a non-combatant.

7. There is nothing in the law of pardons which will warrant the court in reaching a conclusion that the amnesty or immunity claimed to be afforded by the law to the defendants in 1904 wiped out the physical existence of the transactions, matters, and things concerning which they then testified. The difference between a crime committed and forgiven, and its physical occurrence, must not be overlooked. Immunity does not mean that no acts in fact were done, but that there may be no prosecution in respect thereto. Immunity does not wipe out the history of events.

8. A pardon or amnesty secures against the consequences of one's acts, and not against the acts themselves; it involves forgiveness, not forgetfulness. If the claimed immunity did not obliterate the physical existence of the facts about which the defendants furnished evidence to Garfield in 1904, but merely purged them of criminality and rendered them inherently harmless, there is no legal reason why those facts or the evidence concerning them, if competent and relevant, may not be used to trace the history of, or establish, an unlawful conspiracy charged to have been in operation in 1910.

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My conclusion is this: The Constitution guaranteed to the defendants the right of silence only with respect to evidence which might tend to incriminate them. The immunity act rendered the constitutional provision inapplicable, by destroying the incriminating effect of [1018] the evidence given, and by providing absolute immunity from prosecution for any crime already committed concerning the matters, transactions, and things testified about. The immunity furnished related to present, and not future, crimes. That immunity purged the evidence given of all unlawful characteristics, and assured the defendants that up to the time they testified they had done no wicked or wrongful thing. The immunity act did not, and could not, alter or destroy the transactions, matters, and things concerning which the information was furnished. They must exist still as facts, harmless and pure, to be sure, but still tangible facts; and those facts, proper foundation having been laid, and when legally competent and relevant, may be shown at any time, in any action, civil or criminal.

If I am right in my conclusion as to the effect of the fifth amendment and the immunity statutes, upon the evidence given by the defendants to the Commissioner of Corporations in 1904, then the only question remaining is whether the court ought to quash an indictment because incompetent evidence was presented to the grand jury.

5. The cases are uniform to the effect that, except in those states in which, by statute, indictments are required to be returned on "legal" or "competent" evidence, the courts will not review the evidence received by a grand jury for the purpose of passing upon its competency. In the first place, no official record of the evidence introduced before the grand jury ordinarily is kept. In the second place, if, on a motion to quash, the competency of the evidence presented could be inquired into, the trial courts would be obliged to sit as courts of review, to examine into the correctness of every ruling made upon the evidence by the grand jurors. The obstructions to justice and the unnecessary and uncalled-

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for waste of time, and consequent expense to the state as well as to defendants, which would result from such a course, are too obvious to need comment.

In addition to this, the grand jurors are laymen. They do not know, and cannot be expected to know, the technical rules of evidence; and while, no doubt, it is the duty of the prosecutor to give them such aid as he may in that respect, he has no control over them. As a matter of fact, under the common law, and in the state of Illinois, where the common law prevails, grand jurors are entitled to indict upon their personal knowledge, and upon their experience as men of affairs, upon what has transpired in the community with reference to the case under their investigation. They cannot be expected to know what evidence is or is not legally competent. If, therefore, indictments are to be quashed because incompetent evidence was heard by the grand jury, the return of a true bill practically will become an impossibility.

The authorities cited by defendants, in which indictments were quashed because the accused was called before the grand jury and examined, or because private counsel was permitted to appear and address the grand jury, are not in point. In those cases the indictments were quashed, not because incompetent evidence was received, but because the proceedings of the grand jury were unconstitutional and unlawful. Clearly, if the grand jury were improperly impaneled, [1019] or if certain classes of persons unlawfully were excluded from serving thereon, the matter could be brought to the attention of the court, and disposed of, by a motion to quash the indictment.

The two propositions are radically different. It is one thing to quash an indictment because the accused, in violation of his constitutional right, is brought before the grand jury and browbeaten or maltreated, or because private counsel is permitted to harangue the jurors, or because other like fundamental wrongs are permitted, and quite another thing to quash an indictment because a witness is asked concerning facts which mayhap do not tend to prove the charge which the grand jury is to inquire into. The one reaches

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to the organization or fundamental power of the grand jury to act; the other, granting that the grand jury was properly impeached and had the power to proceed, involves the proposition that it acted upon incompetent evidence, and therefore reached an irrational conclusion.

The motions to quash will be denied, and the clerk will enter an order to that effect.

6. The pleas in this case raise an issue of fact as to what evidence was presented to the grand jurors. Grand jurors and witnesses before them are sworn not to disclose what takes place in the jury room. The authorities are conflicting as to whether it is proper in a plea in abatement to raise an issue of fact as to matters which the policy of the law requires to be kept secret. The Supreme Court, however, in *Hale v. Henkel*, *supra*, used the following language:

"The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have, not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony, or that any serious conflict would arise therefrom."

—indicating that such matters properly may be brought to the notice of the court by plea.

The motion to strike the pleas in abatement from the files will be denied, and a rule entered upon the government to reply. If, however, the government sees fit to file a demurrer to the pleas, inasmuch as all of the parties to this cause have indicated a desire to have the matter disposed of upon the merits, and inasmuch as I have treated the questions involved as if a demurrer had been interposed, such demurrer will be sustained as of course.

Syllabus.

[1] THE STANDARD OIL COMPANY OF NEW JERSEY • ET AL. v. THE UNITED STATES.**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MISSOURI.**

Argued March 14, 15, 16, 1910; restored to docket for re-argument April 11, 1910; re-argued January 12, 13, 16, 17, 1911.—Decided May 15, 1911.

[221 U. S., 1.]

The Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, should be construed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in interstate commerce.^b

The combination of the defendants in this case is an unreasonable and undue restraint of trade in petroleum and its products moving in interstate commerce, and falls within the prohibitions of the act as so construed.

Where one of the defendants in a suit, brought by the Government in a Circuit Court of the United States under the authority of § 4 of the Anti-Trust Act of July 2, 1890, is within the district, the court, under the authority of § 5 of that act, can take jurisdiction and order notice to be served upon the non-resident defendants.

Allegations as to facts occurring prior to the passage of the Anti-Trust Act may be considered solely to throw light on acts done after the passage of the act.

[2] The debates in Congress on the Anti-Trust Act of 1890 show that one of the influences leading to the enactment of the statute was doubt as to whether there is a common law of the United States governing the making of contracts in restraint of trade and the creation and maintenance of monopolies in the absence of legislation. While debates of the body enacting it may not be used as means for interpreting a statute, they may be resorted to as a means of ascertaining the conditions under which it was enacted.

The terms "restraint of trade," and "attempts to monopolize," as used in the Anti-Trust Act, took their origin in the common law and were familiar in the law of this country prior to and at the time of the adoption of the act, and their meaning should be sought from the conceptions of both English and American law prior to the passage of the act.

The original doctrine that all contracts in restraint of trade were illegal was long since so modified in the interest of freedom of in-

^a For opinion of Circuit Court (178 Fed. Rep., 177), see vol. 2, 696.

^b Syllabus and statements of arguments copyrighted, 1911, by the Banks Law Publishing Company.

Syllabus.

dividuals to contract that the contract was valid if the resulting restraint was only partial in its operation and was otherwise reasonable.

The early struggle in England against the power to create monopolies resulted in establishing that those institutions were incompatible with the English Constitution.

At common law monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public and at common law; and contracts creating the same evils were brought within the prohibition as impeding the due course of, or being in restraint of, trade.

At the time of the passage of the Anti-Trust Act the English rule was that the individual was free to contract and to abstain from contracting and to exercise every reasonable right in regard thereto, except only as he was restricted from voluntarily and unreasonably or for wrongful purposes restraining his right to carry on his trade. *Mogul Steamship Co. v. McGregor*, 1892, A. C. 25.

A decision of the House of Lords, although announced after an event, may serve reflexly to show the state of the law in England at the time of such event.

This country has followed the line of development of the law of England, and the public policy has been to prohibit, or treat as illegal, contracts, or acts entered into with intent to wrong the public and which unreasonably restrict competitive conditions, limit the right of individuals, restrain the free flow of commerce, or bring about public evils such as the enhancement of prices.

[3] The Anti-Trust Act of 1890 was enacted in the light of the then existing practical conception of the law against restraint of trade, and the intent of Congress was not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which do not unduly restrain interstate or foreign commerce, but to protect that commerce from contracts or combinations by methods, whether old or new, which would constitute an interference with, or an undue restraint upon, it.

The Anti-Trust Act contemplated and required a standard of interpretation, and it was intended that the standard of reason which had been applied at the common law should be applied in determining whether particular acts were within its prohibitions.

The word "person" in § 2 of the Anti-Trust Act, as construed by reference to § 8 thereof, implies a corporation as well as an individual.

The commerce referred to by the words "any part" in § 2 of the Anti-Trust Act, as construed in the light of the manifest purpose of that act, includes geographically any part of the United States and also any of the classes of things forming a part of interstate or foreign commerce.

The words "to monopolize" and "monopolize" as used in § 2 of the Anti-Trust Act reach every act bringing about the prohibited result.

Syllabus

Freedom to contract is the essence of freedom from undue restraint on the right to contract.

In prior cases where general language has been used, to the effect that reason could not be resorted to in determining whether a particular case was within the prohibitions of the Anti-Trust Act, the unreasonableness of the acts under consideration was pointed out and those cases are only authoritative by the certitude that the rule of reason was applied; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and *United States v. Joint Traffic Association*, 171 U. S. 505, limited and qualified so far as they conflict with the construction now given to the Anti-Trust Act of 1890.

The application of the Anti-Trust Act to combinations involving the production of commodities within the States does not so extend the power of Congress to subjects dehors its authority as to render the statute unconstitutional. *United States v. M. O. Knight Co.*, 156 U. S. 1, distinguished.

The Anti-Trust Act generically enumerates the character of the acts prohibited and the wrongs which it intends to prevent and is susceptible of being enforced without any judicial exertion of legislative power.

The unification of power and control over a commodity such as petroleum, and its products, by combining in one corporation the stocks of many other corporations aggregating a vast capital gives rise, of itself, to the prima facie presumption of an intent and purpose to dominate the industry connected with, and gain perpetual control of the movement of, that commodity and its products in the channels of interstate commerce in violation of the Anti-Trust Act of 1890, and that presumption is made conclusive by proof of specific acts such as those in the record of this case.

The fact that a combination over the products of a commodity such as petroleum does not include the crude article itself does not take the combination outside of the Anti-Trust Act when it appears that the monopolization of the manufactured products necessarily controls the crude article.

Penalties which are not authorized by the law cannot be inflicted by judicial authority.

The remedy to be administered in case of a combination violating the Anti-Trust Act is two-fold: first, to forbid the continuance of the prohibited act, and second, to so dissolve the combination as to neutralize the force of the unlawful power.

The constituents of an unlawful combination under the Anti-Trust Act should not be deprived of power to make normal and lawful contracts, but should be restrained from continuing or recreating the unlawful combination by any means whatever; and a dissolution of the offending combination should not deprive the constituents of the right to live under the law but should compel them to obey it.

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In determining the remedy against an unlawful combination, the court must consider the result and not inflict serious injury on the public by causing a cessation of interstate commerce in a necessary commodity.

173 Fed. Rep. 177, modified and affirmed.

The facts, which involve the construction of the Sherman Anti-Trust Act of July 2, 1890, and whether defendants had violated its provisions, are stated in the opinion.

Mr. John G. Johnson and *Mr. John G. Milburn*, with whom *Mr. Frank L. Crawford* was on the brief, for appellants:

The acquisition in 1899 by the Standard Oil Company of New Jersey of the stocks of the other companies was not a combination of independent enterprises. All of the [5] companies had the same stockholders who in the various corporate organizations were carrying on parts of the one business. The business as a whole belonged to this body of common stockholders who, commencing prior to 1870, had as its common owners gradually built it up and developed it. The properties used in the business, in so far as they had been acquired by purchase, were purchased from time to time with the common funds for account of the common owners. For the most part the plants and properties used in the business in 1899 had not been acquired by purchase but were the creation of the common owners. The majority of the companies, and the most important ones, had been created by the common owners for the convenient conduct of branches of the business. The stocks of these companies had always been held in common ownership. The business of the companies and their relations to each other were unchanged by the transfer of the stocks of the other companies to the Standard Oil Company of New Jersey.

The Sherman Act has no application to the transfer to, or acquisition by, the Standard Oil Company of New Jersey of the stocks of the various manufacturing and producing corporations, for the reason that such transfer and acquisition were not acts of interstate or foreign commerce, nor

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direct and immediate in their effect on interstate and foreign commerce, nor within the power of Congress to regulate interstate and foreign commerce. *United States v. Knight*, 156 U. S. 1; *In re Greene*, 52 Fed. Rep. 104.

The contracts, combinations and conspiracies of § 1 of the Sherman Act are contracts and combinations which contractually restrict the freedom of one or more of the parties to them in the conduct of his or their trade, and combinations or conspiracies which restrict the freedom of others than the parties to them in the conduct of their business, when these restrictions directly affect interstate [6] or foreign trade. Purchases or acquisitions of property are not in any sense such contracts, combinations or conspiracies. Contracts in restraint of trade are contracts with a stranger to the contractor's business, although in some cases carrying on a similar one, which wholly or partially restricts the freedom of the contractor in carrying on that business as otherwise he would. Holmes, J., in *Northern Securities case*, 193 U. S. 404; Pollock on Contracts, 7th ed., p. 352. Such contracts are invalid because of the injury to the public in being deprived of the restricted party's industry and the injury to the party himself by being precluded from pursuing his occupation. *Oregon Steam Navigation Co. v. Windsor*, 20 Wall. 68; *Alger v. Thacker*, 19 Pick. 54. Combinations in restraint of trade are combinations between two or more persons whereby each party is restricted in his freedom in carrying on his business in his own way. *Hilton v. Eckersley*, 6 El. & Bl. 47.

The cases in which combinations have been held invalid at common law as being in restraint of trade deal with executory agreements between independent manufacturers and dealers whereby the freedom of each to conduct his business with respect to his own interest and judgment is restricted. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Salt Co. v. Guthrie*, 35 Oh. St. 686; *Arnot v. Pittston and Elmira Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Illinois, 346; *India Bagging Association v. Kosk*, 14 La. Ann. 168; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cali-

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fornia, 510; *Oil Co. v. Adoue*, 83 Texas, 650; *Chapin v. Brown*, 83 Iowa, 156.

The cases in which trusts and similar combinations have been held invalid as combinations in restraint of trade all deal with devices employed to secure the centralized control of separately owned concerns. *People v. North River Sugar Refining Co.*, 54 Hun. 354; *S. C.*, 121 N. Y. 582; *State v. Nebraska Distilling Co.*, 29 Nebraska, 700; *Poca[7]hontas Coke Co. v. Pochatan Coal & Coke Co.*, 60 W. Va. 508.

A conspiracy in restraint of trade is a combination of two or more to deprive others than its members of their freedom in conducting their business in their own way by acts having that effect. A combination to boycott is a sufficient illustration.

The Sherman Act did not enlarge the category of contracts, combinations and conspiracies in restraint of trade. *United States v. Trans-Missouri Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Montague v. Lowry*, 193 U. S. 38; *Swift v. United States*, 196 U. S. 375; *Loewe v. Lawlor*, 208 U. S. 274; *Continental Wall Paper Co. v. Voight & Sons*, 212 U. S. 227, all involved combinations, either expressly by the terms of the agreements constituting them, restricting the freedom of each of the members in the conduct of his or its business, or in the nature of conspiracies to restrict the freedom of others than their members in the conduct of their business. The *Northern Securities case*, 193 U. S. 197, was a combination which, through the device adopted, restricted the freedom of the stockholders of two independent railroad companies in the separate and independent control and management of their respective companies.

Purchases and acquisitions of property do not restrain trade. The freedom of a trader is not restricted by the sale of his property and business. The elimination of competition, so far as his property and business is concerned, is not a restraint of trade, but is merely an incidental effect of the exercise of the fundamental civil right to buy and sell property freely. The acquisition of property is not made

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illegal by the fact that the purchaser intends thereby to put an end to the use of such property in competition with him. Every purchase of [8] property necessarily involves the elimination of that property from use in competition with the purchaser and, therefore, implies an intent to effect such elimination. *Oincinnati Packet Co. v. Bay*, 200 U. S. 179.

The transfer to, and acquisition by, the Standard Oil Company of New Jersey of the stocks of the various corporations in the year 1899 was not, and the continued ownership of those shares with the control which it confers is not, a combination or conspiracy in restraint of trade declared to be illegal by the first section of the Sherman Act. Because of the common ownership of the different properties in interest they were not independent or competitive but they were the constituent elements of a single business organism. This situation was not affected by the transfer to the Standard Oil Company of New Jersey, who had the same body of stockholders and had controlled the separate companies and continued to control them through the Standard Oil Company of New Jersey. These considerations differentiate the present case from the *Northern Securities case*, 193 U. S. 197. The *Northern Securities case* dealt with a combination of diverse owners of separate and diverse properties which were bound by the law of their being as quasi-public corporations invested with public franchises to continue separate, independent and competitive, creating through the instrumentality of the holding company a common control which would necessarily prevent competitive relations.

There is no warrant for the assumption that corporations engaged in the same business are naturally or potentially competitive regardless of their origin or ownership. If the same body of men create several corporations to carry on a large business for the economical advantages of location or for any other reason, and the stocks of these corporations are all in common ownership, it is a fiction to say that they are potentially competitive or that their natural relation is one of competition.

The common owners of the Standard Oil properties and business had the right to vest the properties and business

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in a single corporation, notwithstanding that such a transaction might tend to prevent the disintegration of the different properties into diverse ownerships. The Sherman Act does not impose restrictions upon the rights of joint owners.

The acquisitions prior to 1882 were lawful and their effect upon competition was incidental. The purpose of the trust of 1879 was to bring the scattered legal titles to the joint properties then vested in various individuals into a single trusteeship. The purpose of the trust agreement of 1882 was to provide a practicable trusteeship to hold the legal title to the joint properties, an effective executive management and a marketable symbol or evidence of the interest of each owner. The only question raised in the case of *State v. Standard Oil Company*, 49 O. St. 137, was whether it was *ultra vires* for the Standard Oil Company of Ohio to permit its stock to be held by the trustees instead of by the real owners. The method of distribution adopted on the dissolution of the trust was the only feasible plan of distribution. Each certificate-holder was given an assignment of his proportionate interest in all the companies. All being parts of the common business there was no basis for separate valuations. The value of the interest of every owner was dependent upon its being kept together as an entirety. The transaction of 1899 was practically an incorporation of the entire business by the common owners through the ownership of the Standard Oil Company of New Jersey. That was the plain purpose, object and effect of the transaction.

The first section of the Sherman Act deals directly with contracts, combinations and conspiracies in restraint of trade. The second section deals directly with monopoliz[ing] and attempts to monopolize. Monopolizing does not enlarge the operation of the first section nor does its absence restrict the operation of that section.

The first section deals with entities, a contract, combination, a conspiracy; and the entities themselves are expressly declared to be illegal, and may be annulled or destroyed. The second section deals with acts.

At common law monopoly had a precise definition. Blackstone, Vol. 4, p. 160; *Butchers' Union Co. v. Crescent City*

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Co., 111 U. S. 756. Monopoly imports the idea of exclusiveness and an exclusiveness existing by reason of the restraint of the liberty of others. With the common-law monopoly the restraint resulted from the grant of the exclusive right or privilege. Under the Sherman Act there must be some substitute for the grant as a source of the exclusiveness and restraint essential to monopolizing. The essential element is found in the statement of Judge Jackson (*In re Greene*, 52 Fed. Rep. 116) that monopolizing is securing or acquiring "the exclusive right in such trade or commerce by means which prevent or restrain others from engaging therein." Exclusion by competition is not monopolizing. Pollock on Torts, 8th ed., p. 152; *Mogul case*, L. R. 23 Q. B. D. 615; (1892) App. Cas. 51. Monopolizing within the act is the appropriation of a trade by means of contracts, combinations or conspiracies in restraint of trade or other unlawful or tortious acts, whereby "the subject in general is restrained from that liberty of * * * trading which he had before." In the absence of such means or agencies of exclusion, size, aggregated capital, power, and volume of business are not monopolizing in a legal sense.

Swift v. United States, 196 U. S. 375, was the case of a combination of corporations, firms and individuals separately and independently engaged in the business, together controlling nearly the whole of it, to monopolize it by certain acts and courses of conduct effective to [11] that end when done and pursued by such a combination.

Richardson v. Buhl, 77 Michigan, 632; *People v. North River Sugar Refining Co.*, 54 Hun, 354; *State v. Standard Oil Co.*, 49 O. St. 137; *State v. Distillery Co.*, 29 Nebraska, 700; *Distilling Co. v. People*, 156 Illinois, 448, and *Anderson v. Shawnee Compress Co.*, 209 U. S. 423, rest upon special grounds and are not applicable to this case. See on the other hand, *In re Greene*, 52 Fed. Rep. 104, Jackson, J.; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; *Oakdale Co. v. Garst*, 18 R. I. 484; *State v. Continental Tobacco Co.*, 177 Missouri, 1; *Diamond Match Co. v. Roebor*, 106 N. Y. 473; *Davis v. Booth & Co.*, 131 Fed. Rep. 31; *Robinson v. Brick Co.*, 127 Fed. Rep. 304. The acqui-

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tion of existing plants or properties however extensive, though made to obtain their trade and eliminate their competition, is not a monopoly at common law or monopolizing under the Sherman Act, in the absence of the exclusion of others from the trade by conspiracies to that end or contracts in restraint of trade on an elaborate and effective scale, or other systematic, wrongful, tortious or illegal acts. When such monopolizing is present the remedy of the act is to prohibit the offending conspiracies, contracts, and illegal acts or means of exclusion, leaving the individual or corporation to pursue his or its business with the properties and plants that have been acquired or created shorn of the monopolizing elements in the conduct of the business.

The acquisition of competing plants and properties can not be rendered unlawful by imputing to such acquisitions an intent to monopolize. The acquisition of plants and properties does not exclude anyone from the trade and therefore the intent to monopolize can not be attributed to such acquisitions. The proposition that an acquisition of property is rendered invalid because of a collateral intent to monopolize is not sustained by the [12] authorities relied upon to support it. *Addyston Pipe case*, 85 Fed. Rep. 291, and cases there cited. The substantial acquisitions made by the owners of the Standard Oil business antedated the Sherman Act and they resulted from separate transactions extending over a long period of years. They were in all cases accretions to an existing business. They formed an insignificant part of the business as it now exists. The Sherman Act is intended to prevent present monopolizing or attempts to monopolize. Whether acquisitions made many years ago were or were not associated with an attempt to monopolize has no relation with the present attempt at monopolizing.

The Standard Oil Company of New Jersey was not monopolizing, or attempting to monopolize, or combining with anyone else to monopolize, interstate and foreign trade in petroleum and its products when this proceeding was instituted, or at any time.

The ownership of the pipe lines has not been a means of monopolizing. Substantially all of the pipe lines owned by

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the Standard Oil companies have been constructed by those companies. There has never been any exclusion of anyone from the oil fields either in the production of oil, or its purchase, or its storage, or its gathering or transportation by pipe lines. Ownership of the pipe lines does not give the Standard companies any advantages in dealing with the producers which are not open to others.

The decree erroneously includes and operates upon several of the appellant companies.

The sixth section of the decree is unwarranted and impracticable in various of its provisions.

It was error to deny the motion of the appellants to vacate the order permitting service upon them outside of the Eastern Division of the Eastern District of Missouri, and to set aside the service upon them of the writs of subpoena issued thereunder; and error to overrule the pleas of the appellants to the jurisdiction of the court [18] over them. The appellants were not residents of the Eastern District of Missouri nor were they found therein when the order was made authorizing the service of process upon them outside of the district. There was no proceeding pending in that district involving a controversy for the determination of which the appellants were necessary parties.

Mr. D. T. Watson, also for appellants:

The Government has failed to maintain the affirmative of the issue made by the pleadings. *Brent v. The Bank*, 10 Pet. 614; *The Siren*, 7 Wall. 154; *United States v. Stimson*, 197 U. S. 200, 205.

The transfer in 1899 to the Standard Oil Company of New Jersey of the various non-competitive properties jointly used by them as one property was not a restriction of interstate trade, or an attempt to monopolize, or a violation of the Sherman Act.

The Sherman Act permits trusts, combines, corporations, and individuals to enter into and compete for interstate trade so long as they act lawfully. It does not seek to regulate the methods nor forbid those who enter into trade from

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doing their business in the form of a trust, corporation or combine, provided they carried it on lawfully.

The Standard Oil Company of New Jersey after 1899 might legitimately and properly compete for interstate trade, notwithstanding the combination of the group of properties gave it a great power, only provided it did not restrain such trade or by unlawful means seek to gain a monopoly contrary to the provisions of the Sherman Act.

There is nothing in this case to show that after 1899 the combination did unlawfully compete, restrict or seek to monopolize interstate trade; yet such evidence was indispensable to prove that the combination was violating the Sherman Act in 1906. See the *Calumet & Hecla* [14] case, Judge Knappen, 167 Fed. Rep. 709, 715; Judge Lurton, 167 Fed. Rep. 727, 728; Judge Gray in *United States v. Reading Co.*, decided December 8, 1910.

There is a great difference between the *Northern Securities* case and the case at bar.

On the question of potential competition, the idea of competition between properties all owned by the same persons is a novelty. The idea that properties themselves compete, and that if one man owns two or more he must compete with himself, is startling. Competition between joint owners is also novel. *Fairbanks v. Leary*, 40 Wisconsin, 642, 643; *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454.

Competition is the striving of two or more persons, or corporations, either individually or jointly, for one thing, i. e., trade; it is personal action; the strife between different persons. Properties do not compete. Their relative locations may more readily enable their owners to use them in competition, but of themselves and as against each other, they do not compete.

This idea makes the Sherman Act read that the same person or group of individuals shall not own and operate two or more sites for refineries or for stores or for any kind of manufactories which might be used by different owners in competition. *Joint Traffic Association* case, 171 U. S. 505, 567.

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The words "potential" or "naturally competitive" are not in the Sherman Act. *Cascade Railroad Co. v. Superior Court*, 51 Washington, 346. The rule of potential competition refers only to the ownership of the physical properties which produce the oil which goes into interstate commerce, and not to the oil itself. *United States v. E. O. Knight Co.*, 156 U. S. 1; *Northern Securities Co. v. United States*, 193 U. S. 407.

The Sherman Act is a highly penal one. In a criminal prosecution under the act the degree of proof is beyond a [15] reasonable doubt. In a civil suit under it, the degree is not so great, but the proof must be direct, plain and convincing. *United States v. Trans-Missouri Freight Assn.*, 58 Fed. Rep. 77; *Northern Securities Co. v. United States*, 193 U. S. 197, 401; *State v. Continental Tobacco Co.*, 177 Mississippi, 1.

There is a distinction between private traders and railroad companies; and see also distinction under Sherman Act between quasi-public corporations and private traders. *Trans-Missouri case*, 166 U. S. 290.

The mere method in which stocks are held is not prescribed by the Sherman Act; all methods are lawful if not used to restrict trade or gain an unlawful monopoly. Under the court's ruling the effectiveness of a large business organization may, by reason of that very fact, bring it under the Sherman Act.

The decree below was not justified by the facts found by the court; or by the Sherman Act; after the court in § 5 permitted the distribution among the shareholders of the Standard Oil Company of New Jersey of the stocks held by that company, it did without lawful authority so to do, define and limit the method of that distribution; restrict the distributees in the future sale, use and disposal of their stocks; restrict the distributees in the sale, use and disposal of their properties; and in the contract relations thereafter to exist, as well as the use and disposition of the different properties in such a drastic manner as to greatly injure and destroy the value of the same and render their future profitable use practically impossible. The decree

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disintegrates properties built with appellants' moneys for joint use so as to create units that never before existed and compels these units separately to carry on business and compete with other units, directly contrary to the purpose of their creation. It allows the future operation and use of the refineries, pipe lines, and other properties of the appellants only under the vague and [16] indefinite, but broad and comprehensive, terms of § 6 of the decree, by subjecting those who in the future operate them to attachment for contempt for unwittingly violating vague and indefinite terms. It prohibits appellants from engaging in all interstate commerce until the discontinuance of the operation of the illegal combination, thus inflicting a new penalty for an indefinite and uncertain period.

All of such restrictions are unauthorized by the Sherman Act, are in violation of the settled rules governing injunctions, and are contrary to the provisions of the different decrees heretofore approved by this court under the Sherman Act, and especially the one in the *Northern Securities case*.

The decree authorized by the Sherman Act is wholly negative, and one that merely enjoins—stops an illegal thing in operation when the petition is filed or which then is foreseen. *Lacassagne v. Chapuis*, 144 U. S. 124; *E. O. Knight Co. case*, 156 U. S. 1, 17; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 289; *Swift & Co. v. United States*, 196 U. S. 375, 402; *United States v. Reading Co.*, decided by Circuit Court of the Third Circuit, December 8, 1910.

The Sherman Act prescribes certain specific methods of relief which are exclusive of all others. *Noyes on Inter-corporate Relations*, 2d ed., 1909, § 406; *Greer, Mills & Co. v. Stoller*, 77 Fed. Rep. 1, 3; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 71; *Barnet v. National Bank*, 98 U. S. 555, 558; *East Tennessee R. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 310; *Farmers' Bank v. Dearing*, 91 U. S. 29, 35; *United States v. Union Pacific Railroad Co.*, 98 U. S. 569.

The decree hampers and greatly injures the value of the stock of the stockholders, though they are not parties to the bill.

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A corporation, when party to a bill in equity, does represent [17] its stockholders, but only within the scope of corporate power, and not as to the individual rights of the stockholder to do with his property as he chooses. *Taylor & Co. v. Southern Pacific Co.*, 122 Fed. Rep. 147, 153, 154. A corporation has no right to conclude or affect the right of any shareholder in respect of the ownership or incidents of his particular shares. *Brown v. Pacific Mail Steamship Co.*, Fed. Cas. No. 2025; 5 Blatch. 525; *Morse v. Bay State Gas Co.*, 91 Fed. Rep. 944, 946; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 288-290.

The decree follows the appellants and their properties after the dissolution.

The Sherman Act closely limits and defines the power of the court on a petition filed to give equitable relief. The petition must pray that such violations shall be enjoined or otherwise prohibited; and it is these violations of the act that the court may now enjoin, and only such violations. Past unlawful competition does not deprive parties of their right to conduct lawful competition. *New Haven R. R. case*, 200 U. S. 361, 404.

The Sherman Act does not give power to the courts to strike down and disintegrate a non-competing group of physical properties used to manufacture an article of trade. These physical properties are brought and held and used under state laws; they do not enter into interstate commerce and hence are not under Federal control. *New Haven R. R. Co. v. Interstate Com. Comm.*, 200 U. S. 361, 404; *State v. Omaha Elevator Co.*, 75 Nebraska, 687.

The effect of the decree is ruinous. For instance, these companies jointly own 54,616 miles of pipe lines, of which the seven individual defendants and their associates built over 50,000 miles, in which they have an investment of over \$61,000,000.

The decree splits up this pipe line system into eleven parts, takes away from the owners, who jointly built the pipe lines and who created the sub-companies, all control [18] over the different sub-companies, and compels the eleven different parts to stand alone, independently of their principal and of

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each other, to be hostile to and to compete with their principal and with one another.

Pipe lines are never parallel but always continuous, and each line has a value which depends wholly upon its connection with other parts of the system, and whether all are used together as one whole. The carrying out of the decree would cut the pipe line system into isolated segments, prevent such use, and make the successful operation of the pipe lines impossible.

The decree would especially destroy the value of the stock of all shareholders who each had five shares or less. The stockholders on August 19, 1907, holding from one to four shares each numbered 1,157, and the stockholders owning five shares each numbered 489, out of a total number of 5,083 stockholders.

Considering the case *de novo*, and not on the findings of the court below, it is not true that when the petition in this case was filed in 1906, the seven individual appellants and their associates, private traders in oil, were, contrary to the provisions of the Sherman Act, carrying on a conspiracy to restrain interstate and foreign trade in oils, and to gain by illegal means a monopoly thereof.

The Federal law allowed and allows each of the individuals to compete freely for the interstate and foreign traffic in oil and its products. He may use all the weapons that his ingenuity and skill can suggest, to wage a successful warfare. His rights to compete are not limited to merely such means as are fair or reasonable, but are only limited to such as are unlawful and directly tend to the violation of the Sherman Act. The Federal law also allows and assures to each competitor whatever share, however large, of the interstate or foreign trade in oil he or they may win provided his means are not unlawful. The Sherman Act was passed to protect trade and further [19] competition. It makes such restraint and monopoly a crime and inflicts, on conviction, severe penalties for such offense. It permits one set of competitors to purchase the property of other competitors solely to avoid further competition. The mere size of the competing corporations or combinations is immaterial.

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The monopoly of a trade at common law was forbidden because, and only because, it excluded all others from practicing such trade, and seems to have been then limited to a royal grant, as, for example, giving the exclusive right to manufacture playing-cards. It was and is a distinct thing from engrossing, regrating or forestalling the market, all of which were based on the prevention of artificial prices for the necessities of life. No one of these falls under Federal jurisdiction, but each is subject to state control only.

The present litigation is between the Federal Government and certain of its citizens. The questions involved are solely the rights of these Federal citizens and the effect upon those rights of the Sherman Act, and whether these Federal citizens have violated the provisions of that act.

There was and is no such thing as a Federal crime, aside from express congressional acts, and as no such act was in existence prior to 1890, as to the matters charged in the petition, all the matters and things done by the defendants prior thereto are immaterial.

This case involves, and only involves, the question of the restraint and monopolization of interstate and foreign trade in oil in November, 1906, when the petition was filed; it does not involve any alleged restraint or monopoly of the oil industry in any of the States.

The appellants were lawfully entitled to so hold and use in interstate trade all of its combined properties.

To succeed in this case, the Government must also show that the said Standard Oil Company was then in 1906 [20] using its power to actually restrain interstate or foreign trade in oil, or was then in 1906 excluding or attempting to exclude by illegal means others from said trade and attempting to monopolize the same, or a part thereof.

The Sherman Act does not compel private traders, however organized, to compete with each other. The character of the oil business was and is such that a great corporation was and is an economic necessity for carrying on that industry. The growth and success of the Standard Oil Company was the result of individual enterprise and the natural laws of trade. It was not the result of unlawful means, but of skill, unre-

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mitting toil, denials and hardships, and is an instance of where the continuous use for forty years of skill, labor and capital reached a great success.

To prove a violation of § 1 of the Sherman Act the Government must clearly show that when the petition was filed appellants were then actually restraining interstate trade in oil.

To prove a monopoly under § 2 of the Sherman Act, the Government must show that the appellants were, when the petition was filed, then using unlawful means to maintain their control of the industry and that the appellants were then by unlawful means excluding others from said industry.

The Attorney General and Mr. Frank B. Kellogg, with whom Mr. Cordenio N. Severance was on the brief, for the United States:

It is immaterial that this conspiracy had its inception prior to the enactment of the Sherman Law, or that many of the rebates and discriminations granted by the railroads which enabled the defendants to monopolize the commerce in petroleum antedated the enactment of the Interstate Commerce Act; the principles of the common law applied to interstate as well as to intrastate com[21]merce. *Western Union Telegraph Co. v. Call Pub. Co.*, 181 U. S. 92; *Murray v. C. & N. W. R. Co.*, 62 Fed. Rep. 24; *Interstate Com. Comm. v. B. & O. R. Co.*, 145 U. S. 263; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *National Lead Co. v. Grote Paint Store Co.*, 80 Mo. App. 247; *People v. Chicago Gas Trust*, 130 Illinois, 268; *Richardson v. Buhl*, 77 Michigan, 632; *State v. Nebraska Distilling Co.*, 29 Nebraska, 700; *Distilling & Cattle Feeding Co. v. People*, 156 Illinois, 448.

From the earliest date these various corporations were held together by trust agreements which were void at common law. But whether they were void or not, the combination was a continuing one; there was no vested right by reason of the acquisition of these stocks by the trustees, and when the Sherman Act was passed the continuance of the combination became illegal. *United States v. Freight Association*, 166 U. S. 290, cited and approved in *Waters-Pierce*

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Oil Co. v. Texas, 212 U. S. 86; *Thompson v. Union Castle Steamship Co.*, 166 Fed. Rep. 251; *United States v. American Tobacco Co.*, 164 Fed. Rep. 700; *Finck v. Schneider Granite Co.*, 86 S. W. Rep. 221; *Ford v. Chicago Milk Assn.*, 155 Illinois, 166.

The Standard Oil Company, through various defendant subsidiary corporations is engaged in producing and purchasing crude petroleum in Pennsylvania, West Virginia, Ohio, Indiana, Illinois, Oklahoma, Kansas and California; in transporting the same by pipe lines from the States in which the same is produced into the various other States to the manufactories of the various defendants; in manufacturing the same into the products of petroleum and transporting those products, largely in the tank cars of the Union Tank Line Company (controlled by the Standard Oil Company of New Jersey) to the various marketing places throughout the United States, and in selling and disposing of the same. This clearly makes the defendants engaged in interstate commerce. *Swift & Co. v. [22] United States*, 196 U. S. 375; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Loewe v. Lawlor*, 208 U. S. 274.

The amalgamation of the stocks of all these companies in 1899 in the Standard Oil Company of New Jersey as a holding corporation was a combination in restraint of trade within § 1 of the Sherman Act. *United States v. Northern Securities Co.*, 193 U. S. 197; *Harriman v. Northern Securities Co.*, 197 U. S. 244; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Swift & Co. v. United States*, 196 U. S. 375; *Loewe v. Lawlor*, 208 U. S. 274; *Continental Wall Paper Co. v. Voight*, 148 Fed. Rep. 939; 212 U. S. 227; *Burrows v. Inter. Met. Co.*, 156 Fed. Rep. 389; *Montagus v. Lowry*, 193 U. S. 38; *Distilling & Cattle Feeding Co. v. People*, 156 Illinois, 48; *Harding v. Am. Glucose Co.*, 55 N. E. Rep. 577; *Dunbar v. American Tel. & Teleg. Co.*, 79 N. E. Rep. 427; *Missouri v. Standard Oil Co.*, 218 Missouri, 1; *Merchants' Ice & Cold Storage Co. v. Bohrmann*, 128 S. W. Rep. 599; *State v. International Harvester Co.*, 79 Kansas, 371; *International Harvester Co. v. Commonwealth*, 124 Kentucky, 543; *State v. Creamery Package Mfg. Co.*, 126 N. W. Rep. 126.

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The *Northern Securities case* and other authorities cited under this head are conclusive of the proposition that this is a combination in restraint of trade. The court held that the inhibitions of the Sherman Act were not limited to those direct restraints upon trade and commerce evidenced by contracts between independent lines of railway to fix rates or to maintain rates, or manufacturing or other corporations to limit the supply or control prices; that the power of suppression of competition and therefore of restraint of trade exercised or which could be exercised by reason of stock ownership and control of the various corporations, was as much in violation of the Anti-Trust Act as direct restraint by contract. There is nothing in the act which can be construed to prohibit the suppression of competition by reason of stock control of railways [23] and at the same time to permit it in manufacturing industries, pipe line companies, or car line companies engaged in the manufacture and transportation of oil. The contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, which are inhibited by the first section of the act as applied to these classes of corporations cannot be distinguished from those contracts, combinations in the form of trusts or otherwise, or conspiracies in restraint of trade, when applied to railway companies. The thing inhibited is the restraint of interstate commerce. The thing to be accomplished is the maintenance of the freedom of trade. The inhibition against the suppression of competition by any instrumentality, scheme, plan or device, to evade the act, applies to all corporations and all devices. The real point is not the instrumentality or the scheme used to suppress the competition, but whether competition is thus suppressed and trade restrained and monopolized. Nowhere in the decisions of this court is there authority for the proposition that combinations by stock ownership or the purchase of competing properties is invalid as to railroads but valid as to trading and manufacturing companies. The act of Congress and the decisions of this court, so far as the principle goes, places them upon the same plane. In the argument of the *Freight Association cases* it was urged by counsel that the inhibitions of the

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Sherman Act in this regard did not apply to railroads, but only included trading companies. It is now urged that they apply to railroads and do not apply to manufacturing and trading companies. But this court in the *Freight Association cases* clearly laid down the rule that while there are points of difference existing between the two classes of corporations, yet they are all engaged in interstate commerce, that the injuries to the public have many common features, and that the inhibitions apply to all. 166 U. S. 322.

[24] The transfers of the stocks of these companies in 1899 to the Standard Oil Company of New Jersey had no greater legal sanctity than the transfer to the trustees in 1882, nor was it different from the transfer of the stocks of the Northern Pacific and Great Northern Railways to the Northern Securities Company in 1901, two years after the organization of the present corporate Standard Oil combination. It is the usual course of reasoning urged in all of these trust cases—because a person has a right to purchase property, he may therefore purchase a competitor, and because he may purchase one competitor he may purchase all of his competitors, and what an individual may do a corporation may do. These were the identical arguments pressed with great ability by counsel in the *Northern Securities case* and in the subsequent case of *Harriman v. Northern Securities Co.*, 197 U. S. 291; but this court held to the contrary. The position is also contrary to the almost universal trend of the American decisions both Federal and state. The exercise of an individual right disconnected from all other circumstances may be legal, but when taken together with the other circumstances may accomplish the prohibited thing.

The second section of the act prohibits a person or a single corporation from monopolizing or attempting to monopolize any part of the commerce of the country by any means whatever, and also from conspiring with any other person or persons to accomplish the same object. The two sections of the act were manifestly not intended to cover the same thing; otherwise the second section would be useless. Any contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade which tends to monopoly is

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prohibited by the first section. *Addyston Pipe case*, 175 U. S. 211; *United States v. Northern Securities Co.*, 193 U. S. 334.

The question then is: What is the meaning of the word "monopoly," as used in the second section of the act? [25] Of course Congress did not have in mind monopoly by legislative or executive grant. *National Cotton Oil Co. v. Texas*, 197 U. S. 129; *Burrows v. Inter. Met. Co.*, 156 Fed. Rep. 389, opinion by Judge Holt. Such monopolies could not exist in this country except by grant of Congress or the States, and it has been held that exclusive grants to pursue an ordinary legitimate business are void. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 754. Neither did Congress have in mind an absolute monopoly. This can only be obtained by legislative grant. In a country like ours, where everyone is free to enter the field of industry, no absolute monopoly is probable. It is sufficient to bring it within the act if the combination or the aggregation of capital "tends to monopoly * * * or are reasonably calculated to bring about the things forbidden." *Waters-Pierce Co. v. Texas*, 212 U. S. 86. Originally monopoly meant a grant by a sovereign power, of the exclusive right to carry on any employment. The only act of exclusion was the grant itself. If the grant was void, then there was no monopoly. These monopolies were common in all monarchical countries. Monopoly, however, came to have a broader meaning under the common law in the later days, and especially in the United States, and in order to arrive at what Congress intended by the act of 1890 it is important to understand the history of the times and the general understanding of monopoly as defined by the courts and the political economists, and the monopolies which were known to the people generally and against which Congress was legislating. Prior to the passage of this law, the various trusts cases had been decided, in which trusts, like the Standard Oil of 1882, had been held illegal because they tended to create a monopoly. *People v. North River Sugar Refining Co.*, 54 Hun, 354; *State v. Nebraska Distilling Co.*, 29 Nebraska, 700; *State v. Standard Oil Co.*, 49 Oh. St. 137. Various other decisions had defined monopoly as known

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[26] in this country,—such cases as *Alger v. Thacher*, 19 Pick. 51; *People v. Chicago Gas Trust*, 120 Illinois, 268; *Salt Co. v. Guthrie*, 35 Oh. St. 666; *Craft v. McConoughy*, 79 Illinois, 346; *Central R. R. Co. v. Collins*, 40 Georgia, 582.

These cases were decided before the Sherman Act was passed, and defined monopoly at common law as it was understood and existed in this country. They embrace trusts like the Standard Oil Trust; agreements fixing prices, dividing territory, or limiting production, thereby tending to enhance or control the price of products; general agreements restraining individuals from engaging in any employment except as incident to the sale of property; purchases by corporations of all or a large proportion of competing manufacturing or mechanical plants; combinations of separate businesses in the form of partnership but really for the purpose of controlling the trade; and various other forms of acquiring monopoly. There was no unlawful exclusion of anyone else from doing business in these cases. They show that the term "monopoly" as applied in American jurisprudence meant monopoly acquired by mere individual acts, as distinguished from grant of government, although the individual act in and of itself was not illegal; the concentration of business in the hands of one combination, corporation, or person, so as to give control of the product or prices; as said by Mr. Justice McKenna, in the *Cotton Oil case*, "all suppression of competition, by unification of interest or management."

The case of *Craft v. McConoughy*, *supra*, well illustrates this argument. The pretended copartnership formed between the dealers of the town of Rochelle, while carrying on the business separately, enabled them to control the prices to the detriment of the surrounding country. It was therefore a monopolizing or an attempt to monopolize a part of the commerce of the State; and the monopolization would have been just as effective had these separate business enterprises been stock corporations and the stock placed in the hands of a holding company. A similar illustration was the case of *Smiley v. Kansas*, 196 U. S. 447 (affirming 65 Kansas, 240), in which an attempt to control the grain trade of a

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particular station was held illegal under a state statute. The Standard combination is an attempt to control and monopolize a vast commerce of the entire country, as these people undertook to control and monopolize a local commerce.

The term "monopoly," therefore, as used in the Sherman Act was intended to cover such monopolies or attempts to monopolize as were known to exist in this country; those which were defined as illegal at common law by the States, when applied to intrastate commerce, and those which were known to Congress when the act was passed. The monopoly most commonly known in this country, and which the debates in Congress* show were intended to be prohibited by the act, were those acquired by combination (by purchase or otherwise) of competing concerns. The purchase of a competitor, as a separate transaction standing alone, was the exercise of a lawful privilege, not in and of itself unlawful at common law nor prohibited by statute, yet in the *Northern Securities case* the purchase of stock in a railway was held to be illegal when done in pursuance of a scheme of monopoly.

It is not necessary in this case, and we doubt whether in any case it is possible, to make a comprehensive definition of monopoly which will cover every case that might arise. It is sufficient if the case at bar clearly comes within the provisions of the act. We believe that the defendants have acquired a monopoly by means of a combination of the principal manufacturing concerns through [28] a holding company; that they have, by reason of the very size of the combination, been able to maintain this monopoly through unfair methods of competition, discriminatory freight rates, and other means set forth in the proofs. If this act did not mean this kind of monopoly, we doubt if there is such a thing in this country. The men who framed the Constitution of this country were familiar with the history of monopolies growing out of acts of the Government. They guarded the people against these by constitutional provisions, but they left open the widest field for the exercise of individual

* Cong. Rec., Vol. 21, part 3, pp. 2456-2460, 2562, 2645, 2726, 2728, 2791, 2928; Cong. Rec., Vol. 21, part 5, pp. 4089, 4093, 4098, 4101; Vol. 21, part 6, p. 5954.

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enterprise, and it was the abuse of these personal privileges, made easy by state laws permitting unlimited incorporation, which gave rise to the evils that convinced the people of the necessity for the passage of the Sherman Anti-Trust Act. It was not monopolies as known to the English common law, but monopolies such as were commonly understood to exist in this country which that act prohibited.

As a natural conclusion from the foregoing definition of monopoly by appellant's counsel they claim that the inhibitions of the second section are against the unlawful means used to acquire the monopoly, but that acquired monopoly is not illegal; therefore that the court can only restrain the means by which the monopoly was acquired, leaving the monopoly to exist. We believe this to be an altogether too refined construction of the act. If such be the true interpretation, the result would be that one could combine all the separate manufactures in a given branch of industry in this country by use of unlawful means such as discriminatory freight rates, but, if not attacked by the Government before it had obtained complete control of the business, its very size, with its ramifications through all the States, would make it impossible for anyone else to compete, and it could control the price of products in the entire country and would be beyond the reach of the law. It could, by selling at a low price where a competitor was [29] engaged in business and by raising the price where there was no attempt at competition, absolutely control the business without itself suffering any loss; and yet the Government would be powerless to destroy the monopoly because the unlawful means had been abandoned.

If the court finds this combination to be in restraint of trade and a monopoly, it is authorized by § 8 to enjoin the same and has plenary power to make such decree as is necessary to enforce the terms and provisions of the act. *Northern Securities Co. v. United States*, 193 U. S. 336, 337, 344; *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Marigold*, 9 How. 560, 566; *Crutcher v. Kentucky*, 141 U. S. 57; *In re Rapier*, 143 U. S. 110; *The Lottery case*, 188 U. S. 321; *United States v. General Paper Co.*, opinion of Judge

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Sanborn in settling the decree; not reported; *United States v. American Tobacco Co.*, 164 Fed. Rep. 700; *Chicago, Rock Island & Pacific R. R. Co. v. Union Pacific R. R. Co.*, 47 Fed. Rep. 15, 26.

Evidence that the defendant companies obtained rebates and discriminatory rates in the transportation of their product as against their competitors, and engaged in unfair and oppressive methods of competition thereby destroying the smaller manufacturers and dealers throughout the country, is material in this case. *State of Missouri v. Standard Oil Co.*, 218 Missouri, 1; *State of Minnesota v. Standard Oil Co.*, 126 N. W. Rep. 527; *Standard Oil Co. v. State of Tennessee*, 117 Tennessee, 618; S. C., 120 Tennessee, 86; S. C., 217 U. S. 413; *State of South Dakota v. Central Lumber Co.*, 123 N. W. Rep. 504; *Citizens' Light, Heat & Power Co. v. Montgomery*, 171 Fed. Rep. 553; *State of Nebraska v. Drayton*, 82 Nebraska, 254; S. C., 117 N. W. Rep. 769; *People v. American Ice Co.*, 120 N. Y. Supp. 443.

A person or corporation joining a conspiracy after it is formed, and thereafter aiding in its execution, becomes from that time as much a conspirator as if he originally designed and put it into operation. *United States v. [80] Standard Oil Co.*, 152 Fed. Rep. 294; *Lincoln v. Clafin*, 7 Wall. 132; *United States v. Babcock*, 24 Fed. Cas. 915, No. 14,487; *United States v. Cassidy*, 67 Fed. Rep. 698, 702; *The Anarchist case*, 122 Illinois, 1; *United States v. Pohndon*, 26 Fed. Rep. 682, 684; *People v. Mather*, 4 Wend. 230.

This conspiracy was a continuing offense. Every overt act committed in furtherance thereof was a renewal of the same as to all of the parties. The statute of limitations does not begin to run until the commission of the last overt act. Neither can the parties claim a vested right to violate the law. 19 Am. & Eng. Ency. of Law, 2d ed, "Limitations of Actions;" *United States v. Greene*, 115 Fed. Rep. 343; *Ochs v. People*, 124 Illinois, 399; *Spies v. People*, 122 Illinois, 1; 8 Cyc. 678; *State v. Pippin*, 88 No. Car. 646; *United States v. Bradford*, 148 Fed. Rep. 413; *Commonwealth v. Bartilson*, 35 Pa. St. 489; *People v. Mather*, 4 Wend. 261; *State v. Kemp*, 87 No. Car. 538; *American Fire Ins. Co. v. State*,

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22 So. Rep. (Miss.) 99; *Lorenz v. United States*, 24 App. D. C. 337; *People v. Willis*, 23 Misc. (N. Y.) 568; *Raleigh v. Cook*, 60 Texas, 438; *Commonwealth v. Gillespie*, 10 Am. Dec. (Pa.) 480.

Mr. Chief Justice WHITE delivered the opinion of the court.

The Standard Oil Company of New Jersey and 33 other corporations, John D. Rockefeller, William Rockefeller and five other individual defendants prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of § 4, of the act of July 2, 1890, c. 647, p. 200, known as the Anti-Trust Act, and had for its object the enforcement of the provisions of that act. The record is inordinately voluminous, consisting of twenty-three volumes of printed matter, aggregating about twelve thousand pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex and varied business transactions, extending over a period of nearly forty years. In an effort to pave the way to reach the subjects which we are called upon to consider, we propose at the outset, following the order of the bill, to give the merest possible outline of its contents, to summarize the answer, to indicate the course of the trial, and point out briefly the decision below rendered.

The bill and exhibits, covering one hundred and seventy pages of the printed record, was filed on November 15, 1906. Corporations known as Standard Oil Company of New Jersey, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio and sixty-two other corporations and partnerships, as also seven individuals were named as defendants. The bill was divided into thirty numbered sections, and sought relief upon the theory that the various defendants were engaged in conspiring "to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other

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products of petroleum, among the several States and Territories of the United States and the District of Columbia and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed in or about the year 1870 by three of the individual defendants, viz: John D. Rockefeller, William Rockefeller and Henry M. Flagler. The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill.

The general charge concerning the period from 1870 to 1882 was as follows:

[22] "That during said first period the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and obtained interests through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations, and limited partnerships engaged in purchasing, shipping, refining, and selling petroleum and its products among the various States for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several States, and monopolizing the said commerce."

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870, a corporation known as the Standard Oil Company of Ohio and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards became participants in the illegal combination and either transferred property to the corporation or to individuals to be held for the benefit of all parties in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the

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power thus obtained and in further execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its members obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question the following results were brought about:

(a) That the combination, in addition to the refineries in Cleveland which it had acquired as previously stated, and which it had either dismantled to limit production or continued to operate, also from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio and elsewhere. The properties thus acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some in the name of corporations or limited partnerships affiliated therewith, or some being left in the name of the original owners who had become stockholders in the Standard Oil Company of Ohio and thus members of the alleged illegal combination.

(b) That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York and New Jersey.

(c) That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent of the business of producing, shipping, refining and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim:

"That during the said second period of conspiracy the defendants entered into a contract and trust agreement, [84] by which various

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independent firms, corporations, limited partnerships and individuals engaged in purchasing, transporting, refining, shipping and selling oil and the products thereof among the various States turned over the management of their said business, corporations and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said trust agreement was in restraint of trade and commerce and in violation of law, as hereinafter more particularly alleged."

The trust agreement thus referred to was set out in the bill. It was made in January, 1892. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination and which was held in diverse forms, as we have previously indicated, for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion thereof, became parties to the agreement. This list is in the margin.*

* 1st. All the stockholders and members of the following corporations and limited partnerships, to wit:

Acme Oil Company, New York.
Acme Oil Company, Pennsylvania.
Atlantic Refining Company of Philadelphia.
Bush & Co. (Limited).
Camden Consolidated Oil Company.
Elizabethport Acid Works.
Imperial Refining Company (Limited).
Charles Pratt & Co.
Paine, Ablett & Co.
Standard Oil Company, Ohio.
Standard Oil Company, Pittsburg.
Smith's Ferry Oil Transportation Company.
Solar Oil Company (Limited).
Sone & Fleming Manufacturing Company (Limited).

Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

2d. The following individuals, to wit:

W. C. Andrews, John D. Archbold, Lide K. Arter, J. A. Bostwick, Benjamin Brewster, D. Bushnell, Thomas C. Bushnell, J. N. Camden,

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[35] The agreement made provision for the method of controlling and managing the property by the trustees, for

Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, John Huntington, H. A. Hutchins, Charles F. G. Heye, A. B. Jennings, Charles Lockhart, A. M. McGregor, William H. Macy, William H. Macy, jr., estate of Josiah Macy, William H. Macy, jr., executor; O. H. Payne, A. J. Pouch, John D. Rockefeller, William Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandergrift, William T. Wardwell, W. G. Warden, Joseph L. Warden, Warden, Frew & Co., Louise C. Wheaton, H. M. Hanna, and George W. Chapin, D. M. Harkness, D. M. Harkness, trustee, S. V. Harkness, O. H. Payne, trustee; Charles Pratt, Horace A. Pratt, C. M. Pratt, Julia H. York, George H. Vilas, M. R. Keith, trustees, George F. Chester.

Also all such individuals as may hereafter join in the agreement at the request of the trustees herein provided for.

3d. A portion of the stockholders and members of the following corporations and limited partnerships, to wit:

American Lubricating Oil Company.

Baltimore United Oil Company.

Beacon Oil Company.

Bush & Denslow Manufacturing Company.

Central Refining Co. of Pittsburg.

Chesebrough Manufacturing Company.

Chess Carley Company.

Consolidated Tank Line Company.

Inland Oil Company.

Keystone Refining Company.

Maverick Oil Company.

National Transit Company.

Portland Kerosene Oil Company.

Producers' Consolidated Land and Petroleum Company.

Signal Oil Works (Limited).

Thompson & Bedford Company (Limited).

Devco Manufacturing Company.

Eclipse Lubricating Oil Company (Limited).

Empire Refining Company (Limited).

Franklin Pipe Company (Limited).

Galena Oil Works (Limited).

Galena Farm Oil Company (Limited.)

Germania Mining Company.

Vacuum Oil Company.

H. C. Van Tine & Company (Limited).

Waters-Pierce Oil Company.

Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for."

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the formation of additional manufacturing, etc., corporations in various States, and the trust, unless terminated by a mode specified, was to continue "during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." The agreement provided for the issue of Standard Oil Trust certificates to represent the interest arising under the trust in the properties affected by the trust, which of course in view of the provisions of the agreement and the subject to which it related caused the interest in the certificates to be coincident with and the exact representative of the interest in the combination, that is, in the Standard Oil Company of Ohio. Soon afterwards it was alleged the trustees organized the Standard Oil Company of New Jersey and the Standard Oil Company of New York, the former having a capital stock of \$3,000,000 and the latter a capital stock of \$5,000,000, subsequently increased to \$10,000,000 and \$15,000,000 respectively. The bill alleged "that pursuant to said trust agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and copartnerships, who owned apparently independent refineries and other properties employed in the business of refining and transporting and selling oil in and among said various States and Territories of the United States as aforesaid, to transfer their property situated in said several States to the respective Standard Oil Companies of said States of New York, New Jersey, Pennsylvania and Ohio, and other corporations organized or acquired by said trustees from time to time. * * *." For the stocks and property so acquired the trustees issued trust certificates. It was alleged that in 1888 the trustees "unlawfully controlled the stock and ownership of various corporations and limited partnerships engaged in such purchase and transportation, refining, selling,

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and shipping of oil," as per a list which is excerpted in the margin.¹

[38] The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the Supreme Court of Ohio, on March 2, 1892, of a decree [39] adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself [40] was in

¹ List of corporations the stocks of which were wholly or partially held by the trustees of Standard Oil Trust:

	Capital stock.	Standard Oil Trust ownership.
New York State:		
Acme Oil Company, manufacturers of petroleum products.	\$380,000	Entire.
Atlas Refining Company, manufacturers of petroleum products.	200,000	Do.
American Wick Manufacturing Company, manufacturers of lamp wicks.	25,000	Do.
Bush & Denslow Manufacturing Company, manufacturers of petroleum products.	300,000	50 per cent.
Chesebrough Manufacturing Company, manufacturers of petroleum products.	500,000	2,661-5,000.
Central Refining Company (Limited), manufacturers of petroleum products.	200,000	1-67.3 per cent.
Devos Manufacturing Company, packers, manufacturers of petroleum products.	300,000	Entire.
Empire Refining Company (Limited), manufacturers of petroleum products.	100,000	80 per cent.
Oswego Manufacturing Company, manufacturers of wood cases.	100,000	Entire.
Pratt Manufacturing Company, manufacturers of petroleum products.	800,000	Do.
Standard Oil Company of New York, manufacturers of petroleum products.	5,000,000	Do.
Sons & Fleming Manufacturing Company (Limited), manufacturers of petroleum products.	250,000	Do.
Thompson & Bedford Company (Limited), manufacturers of petroleum products.	250,000	80 per cent.
Vacuum Oil Company, manufacturers of petroleum products.	25,000	75 per cent.
New Jersey:		
Eagle Oil Company, manufacturers of petroleum products.	350,000	Entire.
McKisken Oil Company, jobbers of petroleum products.	75,000	Do.
Standard Oil Company of New Jersey, manufacturers of petroleum products.	3,000,000	Do.
Pennsylvania:		
Acme Oil Company, manufacturers of petroleum products.	300,000	Do.
Atlantic Refining Company, manufacturers of petroleum products.	400,000	Do.
Galena Oil Works (Limited), manufacturers of petroleum products.	150,000	80½ per cent.
Imperial Refining Company (Limited), manufacturers of petroleum products.	300,000	Entire.
Producers' Consolidated Land and Petroleum Company, producers of crude oil.	1,000,000	¾ per cent.
National Transit Company, transporters of crude oil.	25,455,500	94 per cent.
Standard Oil Company, manufacturers of petroleum products.	400,000	Entire.
Signal Oil Works (Limited), manufacturers of petroleum products.	100,000	80½ per cent.

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restraint of trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of the stock held by the trust in 64 of the companies which it controlled to some of the remaining 20 companies, it having controlled before the decree 84 in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected for transfer was virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the attorney general of Ohio instituted contempt proceedings in the quo warranto case based upon the claim that the trust had

Footnote continued.

	Capital stock.	Standard Oil Trust ownership.
Ohio:		
Consolidated Tank-Line Company, jobbers of petroleum products.....	\$1,025,000	57 per cent.
Inland Oil Company, jobbers of petroleum products.....	55,000	50 per cent.
Standard Oil Company, manufacturers of petroleum products.....	3,500,000	Entire.
Solar Refining Company, manufacturers of petroleum products.....	500,000	Do.
Kentucky:		
Standard Oil Company, jobbers of petroleum products...	600,000	Do.
Maryland:		
Baltimore United Oil Company, manufacturers of petroleum products.....	600,000	5,050-6,000.
West Virginia:		
Camden Consolidated Oil Company, manufacturers of petroleum products.....	300,000	51 per cent.
Minnesota:		
Standard Oil Company, jobbers of petroleum products....	100,000	Entire.
Missouri:		
Waters-Pierce Oil Company, jobbers of petroleum products.....	400,000	50 per cent.
Massachusetts:		
Boscon Oil Company, jobbers of petroleum products.....	100,000	Entire.
Maverick Oil Company, jobbers of petroleum products....	100,000	Do.
Maine:		
Portland Kerosene Oil Company, jobbers of petroleum products.....	200,000	Do.
Iowa:		
Standard Oil Company, jobbers of petroleum products....	600,000	60 per cent.
Continental Oil Company, jobbers of petroleum products....	200,000	62½ per cent.

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not been dissolved as required by the decree in that case. About the same time also proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe Line Company, an [41] Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows:

"That during the third period of said conspiracy and in pursuance thereof the said individual defendants operated through the Standard Oil Company of New Jersey, as a holding corporation, which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged."

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended; "so that the business and objects of said company were stated as follows, to wit: 'To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts of the world, and [42] to hold, purchase, mortgage, and convey real estate and personal property outside the State of New Jersey.'"

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The capital stock of the company—which since March 19, 1892, had been \$10,000,000—was increased to \$110,000,000; and the individual defendants, as theretofore, continued to be a majority of the board of directors.

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its common stock to the amount of \$97,250,000. The bill contained allegations referring to the development of new oil fields, for example, in California, southeastern Kansas, northern Indian Territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose of restraining and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899 and the Standard Oil Company of New Jersey since 1899 had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of was continued. Without attempting to follow the elaborate averments on these subjects spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like in-

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tent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce and which had monopolized the same, as alleged in the bill, be found to have existence and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the first and second sections of the Anti-Trust Act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.

Of the numerous defendants named in the bill, the Waters-Pierce Oil Company was the only resident of the [44] district in which the suit was commenced and the only defendant served with process therein. Contemporaneous with the filing of the bill the court made an order, under § 5 of the Anti-Trust Act, for the service of process upon all the other defendants, wherever they could be found. Thereafter the various defendants unsuccessfully moved to vacate the order for service on non-resident defendants or filed pleas to the jurisdiction. Joint exceptions were likewise unsuccessfully filed, upon the ground of impertinence, to many of the aver-

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ments of the bill of complaint, particularly those which related to acts alleged to have been done by the combination prior to the passage of the Anti-Trust Act and prior to the year 1899.

Certain of the defendants filed separate answers, and a joint answer was filed on behalf of the Standard Oil Company of New Jersey and numerous of the other defendants. The scope of the answers will be adequately indicated by quoting a summary on the subject made in the brief for the appellants.

"It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899, was a combination of *independent or competing* concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged or of their purpose, intent or effect."

On June 24, 1907, the cause being at issue, a special examiner was appointed to take the evidence, and his report was filed March 22, 1909. It was heard on April 5 [45] to 10, 1909, under the expediting act of February 11, 1908, before a Circuit Court consisting of four judges.

The court decided in favor of the United States. In the opinion delivered, all the multitude of acts of wrongdoing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the Anti-Trust Act, "except as evidence of their '(the defendants)' purpose, of their continuing conduct and of its effect." (178 Fed. Rep. 177.)

By the decree which was entered it was adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade and also an

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attempt to monopolize and a monopolization under § 2 of the Anti-Trust Act. The decree was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six domestic companies and one foreign company which the Standard Oil Company of New Jersey controls by stock ownership; these 38 corporate defendants being held to be parties to the combination found to exist.*

The bill was dismissed as to all other corporate defendants, 33 in number, it being adjudged by § 3 of the decree that they "have not been proved to be engaged in the operation or carrying out of the combination."¹

[46] The Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over the said 37 subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Oil Company or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Oil Company, and the 37 subsidiary corporations were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.

At the outset a question of jurisdiction requires consideration, and we shall, also, as a preliminary, dispose of another question, to the end that our attention may be completely

* Counsel for appellants says: "Of the 38 (37) corporate defendants named in section 2 of the decree and as to which the judgment of the court applies, four have not appealed, to wit: Corsicana Refining Co., Manhattan Oil Co., Security Oil Co., Waters-Pierce Oil Co., and one, the Standard Oil Co. of Iowa, has been liquidated and no longer exists."

¹ Of the dismissed defendants 16 were natural gas companies and 10 were companies which were liquidated and ceased to exist before the filing of the petition. The other dismissed defendants, 7 in number, were: Florence Oil Refining Co., United Oil Co., Tidewater Oil Co., The Water Pipe Co. (I'd), Platt & Washburn Refining Co., Franklin Pipe Co. and Pennsylvania Oil Co.

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concentrated upon the merits of the controversy when we come to consider them.

First. We are of opinion that in consequence of the presence within the district of the Waters-Pierce Oil Company, the court, under the authority of § 5 of the Anti-Trust Act, rightly took jurisdiction over the cause and properly ordered notice to be served upon the non-resident defendants.

Second. The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the Anti-Trust Act—whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill—we think by no possibility in the present stage of the case can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the [47] passage of the Anti-Trust Act and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

We are thus brought face to face with the merits of the controversy.

Both as to the law and as to the facts the opposing contentions pressed in the argument are numerous and in all their aspects are so irreconcilable that it is difficult to reduce them to some fundamental generalization, which by being disposed of would decide them all. For instance, as to the law. While both sides agree that the determination of the controversy rests upon the correct construction and application of the first and second sections of the Anti-Trust Act, yet the views as to the meaning of the act are as wide apart as the poles, since there is no real point of agreement on any view of the act. And this also is the case as to the scope and effect of authorities relied upon, even although in some instances one and the same authority is asserted to be controlling.

So also is it as to the facts. Thus, on the one hand, with relentless pertinacity and minuteness of analysis, it is in-

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sisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and that its entire career exemplifies an inexorable carrying out of such wrongful intents, since, it is asserted, the pathway of the combination from the beginning to the time of the filing of the bill is marked with constant proofs of wrong inflicted upon the public and is strewn with the wrecks resulting from crushing out, without regard to law, the individual rights of others. Indeed, so conclusive, it is urged, is the proof on these subjects that it is asserted that the existence of the principal corporate defendant—the Standard Oil Company of New Jersey—with the vast accumulation of property which it owns or controls, because of its infinite potency [48] for harm and the dangerous example which its continued existence affords, is an open and enduring menace to all freedom of trade and is a byword and reproach to modern economic methods. On the other hand, in a powerful analysis of the facts, it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals. It is not denied that in the enormous volume of proof contained in the record in the period of almost a lifetime to which that proof is addressed, there may be found acts of wrong-doing, but the insistence is that they were rather the exception than the rule, and in most cases were either the result of too great individual zeal in the keen rivalries of business or of the methods and habits of dealing which, even if wrong, were commonly practised at the time. And to discover and state the truth concerning these contentions both arguments call for the analysis and

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weighing, as we have said at the outset, of a jungle of conflicting testimony covering a period of forty years, a duty difficult to rightly perform and, even if satisfactorily accomplished, almost impossible to state with any reasonable regard to brevity.

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernable, which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the first and second sections of the Anti-Trust Act. We shall [49] therefore—departing from what otherwise would be the natural order of analysis—make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the first and second sections of the Anti-Trust Act by the text, and after discerning what by that process appears to be its true meaning we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this we shall then approach the facts. Following this course we shall make our investigation under four separate headings: First, the text of the first and second sections of the act originally considered and its meaning in the light of the common law and the law of this country at the time of its adoption; second, the contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely; third, the application of the statute to facts; and, fourth, the remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the first and second sections of the act, as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among

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the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by [50] imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times, that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (*United States v. Trans-Missouri Freight Association*, 166 U. S. 318, and cases cited) that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the first section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject, with which the second sec[51]tion is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law,

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and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor then, first to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the Anti-Trust Act.

(a) It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation and was otherwise reasonable the contract was held to be valid:

(b) Monopolies were defined by Lord Coke as follows:

"'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181, c. 85.)"

Hawkins thus defined them:

"'A monopoly is an allowance by the king to a particular person or persons of the sole buying, selling, making, [52] working, or using of anything whereby the subject in general is restrained from the freedom of manufacturing or trading which he had before.' (Hawk. P. C. bk. 1, c. 29.)"

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English constitution is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make

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them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; (2) the power which it engendered of enabling a limitation on production; and, (3) the danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale. As monopoly as thus conceived embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least so far as the necessities of life were concerned, that individuals by the abuse of their right to contract might be able to usurp the power arbitrarily to enhance prices, one of the wrongs arising from monopoly, it came to be that laws were passed relating to offenses such as forestalling, regrating and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. [53] This is illustrated by the definition of engrossing found in the statute, 5 and 6 Edw. VI, ch. 14, as follows:

"Whatsoever person or persons * * * shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victual, whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers."

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would re-

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sult from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus Pollerfen, in his argument in *East India Company v. Sandys*, Skin. 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Inst. 81; F. B. 65; 1 Roll. 4; that the common law is as much against 'monopoly' as 'engrossing;' and that they differ only, that a 'monopoly' is by patent from the king, the other is by the act of the subject between party and party; but that the mischiefs are the same from both, and there is the same law against both. Moore, 673; 11 Rep. 84. The sole trade of anything is 'engrossing' ex rei natura, for whosoever hath the sole trade of buying and selling hath 'engrossed' that trade; and who[54]soever hath the sole trade to any country, hath the sole trade of buying and selling the produce of that country, at his own price, which is an 'engrossing.'"

And by operation of the mental process which led to considering as a monopoly acts which although they did not constitute a monopoly were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord Coke's definition of monopoly as being "an institution or allowance * * * whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before or hindered in their lawful trade." It is illustrated also by the definition which Hawkins gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of Parker, C. J., in *Mitchell v. Reynolds* (1711), 1 P. Williams, 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this:
(1) That by the common law monopolies were unlawful be-

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cause of their restriction upon individual freedom of contract and their injury to the public; (2) that as to necessities of life the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly, that is an undue enhancement of price; (3) that to protect the freedom of contract of the individual not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly and the same considerations caused monopoly because of its operation and effect, to be brought within and spoken of generally as impeding the due course of or being in restraint of trade.

From the development of more accurate economic conceptions and the changes in conditions of society it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III, ch. 71, enacted in 1772, and statute of 7 and 8 Victoria, ch. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of and not in restraint of trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly

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in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed, not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monopoly might result. After all, this was but an instinctive recognition [56] of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul Steamship Co. v. McGregor* (1892), A. C. 25. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the Anti-Trust Act, it serves reflexly to show the exact state of the law in England at the time the anti-trust statute was enacted.

In this country also the acts from which it was deemed there resulted a part if not all of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the Province of Massachusetts, that is, chap. 31 of the laws of 1778-1779, by which monopoly and fore-stalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put

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by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized [57] in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our Government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject or many judicial decisions which illustrate it would unnecessarily prolong this opinion. We append in the margin a note to treatises, etc., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.*

It will be found that as modern conditions arose the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought [58] justified the inference of intent to do the wrongs which it had been the purpose to prevent from the beginning. The evolution

*Purdy's *Beach on Private Corporations*, vol. 2, pp. 1403, et seq., chapter on Trusts and Monopolies; Cooke on *Trade and Labor Combinations*, App. II, pp. 194-195; *Am. & Eng. Ency. Law*, 2d ed., article "Monopolies and Trusts," pp. 844, et seq.

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is clearly pointed out in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, and *Shawnee Compress Co. v. Anderson*, 209 U. S. 428; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending as it did upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be [59] of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the first and second sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed

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to have been used in that sense unless the context compels to the contrary.*

As to the first section, the words to be interpreted are:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal."

As there is no room for dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is what was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

(a) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

(b) That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of [60] interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

* *Shoerington v. United States*, 161 U. S. 446; *United States v. Wong Kim Ark*, 169 U. S. 649; *Keck v. United States*, 172 U. S. 446; *Kepner v. United States*, 195 U. S. 100, 126.

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(c) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace—

[61] "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, * * *"

- By reference to the terms of § 8 it is certain that the word person clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part" construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize" as used in the section reach every act bringing about

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the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made as it [62] was intended to be the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete it indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented

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if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless before definitively applying that meaning it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects a much wider and in every view at least a somewhat different significance. And to do this brings us to the second question which, at the outset, we have stated it was our purpose to consider and dispose of.

[63] *Second. The contentions of the parties as to the meaning of the statute and the decisions of this court relied upon concerning those contentions.*

In substance, the propositions urged by the Government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true because as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or if this conclusion were not reached, then the contention

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would require it to be held that as the statute did not define the things to which it related and excluded resort to the only means by which the acts to which it relates could be ascertained—the light of reason—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers and the absence of any definition of restraint of trade as used in the statute leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the appli[64]cation of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States v. Freight Association*, 166 U. S. 290, and *United States v. Joint Traffic Association*, 171 U. S. 505. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot by any possible conception be treated as authoritative without the certitude that

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reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed [65] contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning it is true to say that the cases relied upon do not when rightly construed sustain the doctrine contended for is established by all of the numerous decisions of this court which have applied and enforced the Anti-Trust Act, since they all in the very nature of things rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted. Indeed intermediate the decision of the two cases, that is, after the decision in the *Freight Association case* and before the decision in the *Joint Traffic case*, the case of *Hopkins v. United States*, 171 U. S. 578, was de[66]cided, the opinion being delivered by Mr. Justice Peckham, who wrote both the

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opinions in the *Freight Association* and the *Joint Traffic cases*. And, referring in the *Hopkins case* to the broad claim made as to the rule of interpretation announced in the *Freight Association case*, it was said (p. 592) :

"To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act."

And in the *Joint Traffic case* this statement was expressly reiterated and approved and illustrated by example; like limitation on the general language used in *Freight Association* and *Joint Traffic cases* is also the clear result of *Bement v. National Harrow Co.*, 186 U. S. 70, 92, and especially of *Cincinnati Packet Co. v. Bay*, 200 U. S. 179.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

[67] If it be true that there is this identity of result between the rule intended to be applied in the *Freight Association case*, that is, the rule of direct and indirect, and the rule of reason which under the statute as we construe it should be here applied, it may be asked how was it that in the opinion in the *Freight Association case* much consideration was given to the subject of whether the agreement or

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combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met, for if it be now deemed that the *Freight Association case* was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason. This distinction, we think, serves to point out what in its ultimate conception was the thought underlying the reference to the rule of reason made in the *Freight Association case*, especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the *Hopkins case* and in *Cincinnati Packet Company v. Bay*, 200 U. S. 179.

And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the *Freight Association* and *Joint Traffic cases* from the con- [68] text and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the Anti-Trust Law has been applied and enforced and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the Anti-Trust Law aside from the contention as to the *Freight Association* and

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Joint Traffic cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

So far as the objections of the defendants are concerned they are all embraced under two headings:

(a) That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States. But all the structure upon which this argument proceeds is based upon the decision in *United States v. E. O. Knight Co.*, 156 U. S. 1. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no ex[69]press notice. *United States v. Northern Securities Co.*, 193 U. S. 197, 334; *Loewe v. Lawlor*, 208 U. S. 274; *Swift & Co. v. United States*, 196 U. S. 375; *Montague v. Lowry*, 193 U. S. 38; *Shawnee Compress Co. v. Anderson*, 209 U. S. 428.

(b) Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade, which is essentially necessary to the well-being of society and which it is insisted is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have

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given the statute, of course the propositions which rest upon that premise need not be further noticed.

So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from [70] the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take for instance the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce.

We come then to the third proposition requiring consideration, viz:

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio;
2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the supreme court of Ohio, culminating in a decree based upon the finding that the company

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was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the [71] situation as it existed at the time of the entry of the decree below, since during the more than ten years which elapsed between the acquiring by the New Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation of course had somewhat changed, a change which when analyzed in the light of the proof, we think, establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence, that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of §§ 2 and 4 of the decree below, which are excerpted in the margin.*

* SEC. 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, Consolidated, Cumberland Pipe Line Company, Colonial Oil Company,

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[72] Giving to the facts just stated, the weight which it was deemed they were entitled to, in the light afforded by

Continental Oil Company, Crescent Pipe Line Company, Henry O. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil and Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company, of California, Standard Oil Company, of Indiana, Standard Oil Company, of Iowa, Standard Oil Company, of Kansas, Standard Oil Company, of Kentucky, Standard Oil Company, of Nebraska, Standard Oil Company, of New York, Standard Oil Company, of Ohio, Swan and Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, Waters-Pierce Oil Company, have entered into and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the states, in the territories and with foreign nations, in violation of section 2 of the Anti-Trust Act.

* * * * *

Sec. 4. That in the formation and extension of the combination or conspiracy the Standard Company has issued its stock to the amount of more than \$90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling interests in some corporations and stock in other corporations as follows:

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Anglo-American Oil Company, Limited.....	£1,000,000	\$999,740
Atlantic Refining Company.....	\$5,000,000	\$5,000,000
Borneo-Brynmor Company.....	200,000	199,700
Buckeye Pipe Line Company.....	10,000,000	9,999,700
Chesbrough Manufacturing Company, Consolidated.....	500,000	477,700
Colonial Oil Company.....	250,000	249,500
Continental Oil Company.....	380,000	380,000
Crescent Pipe Line Company.....	3,000,000	3,000,000
Eureka Pipe Line Company.....	5,000,000	4,999,500
Galena-Signal Oil Company.....	10,000,000	7,079,500
Indiana Pipe Line Company.....	1,000,000	999,700
Lawrence Natural Gas Company.....	1,450,000	439,000
Mahoning Gas Fuel Company.....	150,000	149,000
Mountain State Gas Company.....	800,000	800,000
National Transit Company.....	25,455,300	25,451,650
New York Transit Company.....	5,000,000	5,000,000

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the [73] proof of other cognate facts and circumstances, the court below held that the acts and dealings established by the [74] proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade in violation of the first section of the act, but also to be an attempt to monopolize and a monopolization bringing about a perennial violation of the second section.

Footnote continued.

Name of company	Total capital stock	Owned by Standard Oil Company.
Northern Pipe Line Company.....	\$4,000,000	\$4,000,000
Northwestern Ohio Natural Gas Company.....	2,775,250	1,646,450
Ohio Oil Company.....	10,000,000	9,999,850
People's Natural Gas Company.....	1,000,000	1,000,000
Pittsburg Natural Gas Company.....	310,000	310,000
Solar Refining Company.....	500,000	499,400
Southern Pipe Line Company.....	10,000,000	10,000,000
South Penn Oil Company.....	2,500,000	2,500,000
Southwest Pennsylvania Pipe Lines.....	3,500,000	3,500,000
Standard Oil Company (of California).....	17,000,000	16,999,800
Standard Oil Company (of Indiana).....	1,000,000	999,000
Standard Oil Company (of Iowa).....	1,000,000	1,000,000
Standard Oil Company (of Kansas).....	1,000,000	999,800
Standard Oil Company (of Kentucky).....	1,000,000	997,200
Standard Oil Company (of Nebraska).....	600,000	599,500
Standard Oil Company (of New York).....	15,000,000	15,000,000
Standard Oil Company (of Ohio).....	3,500,000	3,499,400
Swan and Finch Company.....	100,000	100,000
Union Tank Line Company.....	3,500,000	3,499,400
Vacuum Oil Company.....	2,500,000	2,500,000
Washington Oil Company.....	100,000	71,490
Waters-Pierce Oil Company.....	400,000	374,760

That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following-named corporations and limited partnerships stated opposite each, respectively, as follows:

Name of company.	Total capital stock.	Owned by National Transit Company.
Connecting Gas Company.....	\$225,000	\$412,000
Cumberland Pipe Line Company.....	1,000,000	999,500
East Ohio Gas Company.....	4,000,000	4,000,000
Franklin Pipe Company, Limited.....	50,000	19,500
Prudhoe Oil and Gas Company.....	10,000,000	9,999,500

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We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect, that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have [75] construed it upon the inferences deducible from the facts, for the following reasons:

(a) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than

That the Standard Company has also acquired the control by the ownership of its stock or otherwise of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont in that State, and the Manhattan Oil Company, a corporation, which owns a pipe line situated in the States of Indiana and Ohio; that the Standard Company, and the corporations and partnerships named in section 2, are engaged in the various branches of the business of producing, purchasing and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Louisiana, Texas, Colorado, and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other states, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the states and territories of the United States, the District of Columbia and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various states and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the states and territories of the United States, in the District of Columbia and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

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would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

(b) Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the [76] expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view. And, considering the

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period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the Supreme Court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the method first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated and which among other things impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, [77] the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other, and if the inference which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, viz:

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Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted [78] the application of remedies two-fold in character becomes essential: 1. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

Let us then, as a means of accurately determining what relief we are to afford, first come to consider what relief was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force.

The court below by virtue of §§ 1, 2, and 4 of its decree, which we have in part previously excerpted in the margin, adjudged that the New Jersey corporation in so far as it held the stock of the various corporations, recited in §§ 2 and

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4 of the decree, or controlled the same was a combination in violation of the first section of the act, and an attempt to monopolize or a monopolization contrary to the second section of the act. It commanded the dissolution of the combination, and therefore in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock. To [79] make this command effective § 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporation or doing any act which would recognize further power in that company, except to the extent that it was necessary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

By § 7, pending the accomplishment of the dissolution of the combination by the transfer of stock and until it was consummated, the defendants named in § 1, constituting all the corporations to which we have referred, were enjoined from engaging in or carrying on interstate commerce. And by § 9, among other things a delay of thirty days was granted for the carrying into effect of the directions of the decree.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the first section and an attempt to create a monopoly or to monopolize under the second section and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of § 5 of the

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decree which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership [80] in the New Jersey corporation of the stocks which were ordered to be retransferred.

But the contention is that, in so far as the relief by way of injunction which was awarded by § 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, the relief awarded was too broad: *a*. Because it was not sufficiently specific and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a general injunction. *New Haven R. R. v. Interstate Commerce Commission*, 200 U. S. 404. Besides it is said that the restraint imposed by § 6—even putting out of view the consideration just stated—was moreover calculated to do injury to the public and it may be in and of itself to produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the [81] Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use

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by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved. In other words we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest it was obviously right. We think that in view of the magnitude of the interests involved and their complexity that the delay of thirty days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation but by all the subsidiary companies until the dissolution of the combination by the transfer of the stock in accordance with the decree should not have been awarded.

Our conclusion is that the decree below was right and should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

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Mr. Justice HANLAN concurring in part, and dissenting in part.

A sense of duty constrains me to express the objections which I have to certain declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Company of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce—all in violation of what is known as the Anti-Trust Act of 1890. 26 Stat. 209, c. 647. The evidence in this case overwhelmingly sustained that view and led the Circuit Court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while affirming the decree, directs some modifications in respect of what it characterizes as "minor matters." It is to be apprehended that those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that—

"it does not necessarily follow that because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation, [88] that a like restraint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation."

Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed—unwisely, I think—that although the New Jersey corporation, being an illegal combination, must go out of existence, *they* may join in an agreement to *restrain commerce* among the States if such restraint be not "undue."

In order that my objections to certain parts of the court's opinion may distinctly appear, I must state the circum-

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stances under which Congress passed the Anti-Trust Act, and trace the course of judicial decisions as to its meaning and scope. This is the more necessary because the court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the Government. With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions. Let us see how the matter stands.

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then [84] imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. All agreed that the National Government could not, by legislation, regulate the domestic trade carried on wholly within the several States; for, power to regulate such trade remained with, because never surrendered by, the States. But, under authority expressly granted to it by the Constitution, Congress could regulate commerce among the several States and with foreign States. Its authority to regulate such commerce was and is paramount, due force being given to other provisions of the fundamental law devised by the fathers for the safety of the Government and for the protection and security of the essential rights inhering in life, liberty and property.

Guided by these considerations, and to the end that the people, *so far as interstate commerce* was concerned, might

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not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the Anti-Trust Act of 1890 in these words (the italics here and elsewhere in this opinion are mine) :

"SEC. 1. *Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make *any such contract or engage in any such combination or conspiracy*, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, [85] to monopolize *any part* of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 3. *Every* contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any *such* contract or engage in any *such* combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 200, c. 647.

The important inquiry in the present case is as to the meaning and scope of that act in its application to interstate commerce.

In 1896 this court had occasion to determine the meaning and scope of the act in an important case known as the *Trans-Missouri Freight case*. 166 U. S. 290. The question there was as to the validity under the Anti-Trust Act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules and regulations in respect of freight traffic over specified routes. Two questions were

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involved: First, whether the act applied to railroad carriers; second, whether the agreement the annulment of which as illegal was the basis of the suit which the United States brought. The court [86] held that railroad carriers were embraced by the act. In determining that question, the court, among other things, said:

"The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to *any* contract of the nature described. A contract therefore that is in restraint of trade or commerce is, by the strict language of the act prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it, the agreement is condemned by this act. * * * Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited *all* contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. * * * While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All* combinations which are *in restraint of trade or commerce* are prohibited, whether in the form of trusts or *in any other form whatever.*" *United States v. Freight Assn.*, 168 U. S. 290, 312, 324, 326.

The court then proceeded to consider the second of the above questions, saying:

"The next question to be discussed is as to what is the true construction of the statute, [87] assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, 'that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal?' Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature? It is now with much amplification of argument urged that the statute, in declaring illegal every combina-

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tion in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in *unreasonable* restraint thereof. * * * By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and *not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.* When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. * * * If only that kind of contract [88] which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. * * * To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of unreasonableness to the companies themselves. * * * But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found *in the terms of the statute* under consideration. * * * The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government*, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. *This we cannot and ought not to do.* * * *

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"If the act ought to read, as contended for by defendants, *Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable*. Large numbers do not agree that the view taken by defendants [89] is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the Government is to be found in its *statutes*, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, *public policy is such a case is what the statute enacts*. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal *all* agreements which are *in restraint* of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature."

I have made these extended extracts from the opinion of the court in the *Trans-Missouri Freight* case in order to show beyond question, that the point was there urged by counsel that the Anti-Trust Act condemned *only* contracts, combinations, trusts and conspiracies that were in *unreasonable* restraint of interstate commerce, and that the court in clear and decisive language met that point. It adjudged that Congress had in unequivocal words declared that "*every* contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several States" shall be illegal, and that no distinction, *so far as interstate commerce was concerned*, was to be tolerated between restraints of such commerce as were undue or unreasonable, and restraints that were due or reasonable. With full knowledge of the then condition of the country and of its business, Congress deter[90]mined to meet, and did meet, the situation by an absolute, statutory prohibition of "*every* contract, combination in the form of trust or otherwise, in restraint of trade or commerce." Still more; in response to the suggestion by able counsel that Congress intended only to strike down such contracts, combinations and monopolies as unreasonably restrained interstate commerce,

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this court, in words too clear to be misundertood, said that to so hold was "to read into the act by way of *judicial legislation*, an exception not placed there by the law-making branch of the Government." "This," the court said, as we have seen, "*we cannot and ought not to do.*"

It thus appears that fifteen years ago, when the purpose of Congress in passing the Anti-Trust Act was fresh in the minds of courts, lawyers, statesmen, and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the *Freight Association case*. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so *amend* the act as to recognize the right to restrain interstate commerce to a *reasonable* extent. The public press, magazines and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent and scope of the Anti-Trust Act had been judicially determined by this court, and that the only question remaining open for discussion was the [91] wisdom of the policy declared by the act—a matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the Government, with full knowledge of that decision, has refused to change the policy it had declared or to so amend the act of 1890 as to except from its operation contracts, combinations, and trusts that *reasonably* restrain interstate commerce.

But those who were in combinations that were illegal did not despair. They at once set up the baseless claim that the decision of 1896 disturbed the "business interests of the

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country," and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to *reasonable* restraints. Finally, an opportunity came again to raise the same question which this court had, upon full consideration, determined in 1896. I now allude to the case of *United States v. Joint Traffic Association*, 171 U. S. 505, decided in 1898. What was that case?

It was a suit by the United States against more than thirty railroad companies to have the court declare illegal, under the Anti-Trust Act, a certain agreement between these companies. The relief asked was denied in the subordinate Federal courts and the Government brought the case here.

It is important to state the points urged in that case by the defendant companies charged with violating the Anti-Trust Act, and to show that the court promptly met them. To that end I make a copious extract from the opinion in the *Joint Traffic case*. Among other things, the court said:

"Upon comparing that agreement [the one in the *Joint Traffic case*, then under consideration, 171 U. S. 505] with the one set forth in the case of *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, the great similarity between them suggests that a similar result should be reached in the two cases." (P. 558.)

[92] Learned counsel in the *Joint Traffic case* urged a reconsideration of the question decided in the *Trans-Missouri case* contending that "the decision in that case [the *Trans-Missouri Freight case*] is quite plainly erroneous, and the consequences of such error are far reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the Anti-trust statute has been received by the public with surprise and alarm." They suggested that the point made in the *Joint Traffic case* as to the meaning and scope of the act might have been but was not made in the previous case. The court said (171 U. S. 559) that "the report of the *Trans-Missouri case* clearly shows not only that the point now taken *was* there urged upon the attention of the court, but it was then *intentionally* and *necessarily* decided."

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The question whether the court should again consider the point decided in the *Trans-Missouri case*, 171 U. S. 573, was disposed of in the most decisive language, as follows:

"Finally, we are asked to reconsider the question decided in the *Trans-Missouri case*, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same [93] questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri case* shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, *with care and deliberation* and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now for the *third time* the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the *Trans-Missouri case*. The learned counsel while making the application frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly and so forcibly presented in the dissenting opinion of Mr Justice White [in the *Freight case*] that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some

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of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of [94] the court came to the conclusion it did. It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed. *As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.*"

These utterances, taken in connection with what was previously said in the *Trans-Missouri Freight* case, show so clearly and affirmatively as to admit of no doubt that this court, many years ago, upon the fullest consideration, interpreted the Anti-Trust Act as prohibiting and making illegal not only *every* contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempts to monopolize "any part" of such trade or commerce. Let me refer to a few other cases in which the scope of the decision in the *Freight Association* case was referred to: In *Bement v. National Harrow Co.*, 186 U. S. 70, 92, the court said: "It is true that it has been held by this court that the act (Anti-Trust Act) included any restraint of commerce, whether *reasonable or unreasonable*"—citing *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe &c. Co. v. United States*, 175 U. S. 211. In *Montague v. Lowry*, 193 U. S. 38, 46, which involved the validity, under the Anti-Trust Act, of a certain association formed for the sale of tiles, mantels, and grates, the court referring to the contention that the sale of tiles in San Francisco was so small "as to be a negligible quantity," held that the association was nevertheless a combination in restraint of interstate trade or com[95]merce in violation of the Anti-Trust Act. In *Loewe v. Lawlor*, 208 U. S. 274, 297, all the members of this court concurred in saying that the *Trans-Missouri*, *Joint Traffic* and *Northern Securities*

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cases "hold in effect that the Anti-Trust Law has a broader application than the prohibition of restraints of trade unlawful at common law." In *Shawnee Compress Co. v. Anderson* (1907), 209 U. S. 423, 432, 434, all the members of the court again concurred in declaring that "it has been decided that not only unreasonable, but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." In *United States v. Addyston Pipe Company*, 85 Fed. Rep. 271, 278, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, said that according to the decision of this court in the *Freight Association case*, "contracts in restraint of interstate transportation were within the statute, whether the restraints could be regarded as reasonable at common law or not." In *Chesapeake & Ohio Fuel Co. v. United States* (1902), 115 Fed. Rep. 610, 619, the Circuit Court of Appeals for the Sixth Circuit, after referring to the right of Congress to regulate interstate commerce, thus interpreted the prior decisions of this court in the *Trans-Missouri*, the *Joint Traffic* and the *Addyston Pipe and Steel Co. cases*:

"In the exercise of this right, Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the courts the consideration of the question whether such restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but all contracts and combinations are declared illegal if in restraint of trade or commerce among the States."

As far back as *Robbins v. Shelby Towing District*, 120 U. S. 489, 497, it was held that certain local regulations, subjecting drummers engaged in both interstate and domestic trade, could not be sustained by reason of the fact that no discrimina[96]tion was made among citizens of the different States. The court observed that this did not meet the difficulty, for the reason that "interstate commerce cannot be taxed at all." Under this view Congress no doubt acted, when by the Anti-Trust Act it forbade any restraint whatever upon interstate commerce. It manifestly proceeded upon the theory that interstate commerce could not be restrained at all by combinations, trusts or monopolies, but

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must be allowed to flow in its accustomed channels, wholly unvexed and unobstructed by anything that would restrain its ordinary movement. See also *Minnesota v. Barber*, 186 U. S. 313, 326; *Brimmer v. Rebman*, 138 U. S. 78, 82, 83.

In the opinion delivered on behalf of the minority in the *Northern Securities case*, 193 U. S. 197, our present Chief Justice referred to the contentions made by the defendants in the *Freight Association case*, namely, one of which was that the agreement there involved did not unreasonably restrain interstate commerce, and said:

"Both these contentions were decided against the association, the court holding that the Anti-Trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable."

One of the Justices who dissented in the *Northern Securities case* in a separate opinion, concurred in by the minority, thus referred to the *Freight* and *Joint Traffic cases*:

"For it cannot be too carefully remembered that that clause applies to 'every' contract of the forbidden kind—a consideration which was the turning point of the *Trans-Missouri Freight Association case*.
* * * Size has nothing to do with the matter. A monopoly of 'any part' of commerce among the States is unlawful."

In this connection it may be well to refer to the adverse report made in 1909, by Senator Nelson, on behalf of the Senate Judiciary Committee, in reference to a certain bill [97] offered in the Senate and which proposed to amend the Anti-Trust Act in various particulars. That report contains a full, careful and able analysis of judicial decisions relating to combinations and monopolies in restraint of trade and commerce. Among other things said in it which bear on the questions involved in the present case are these:

"The Anti-Trust Act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is reasonable or unreasonable would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. * * * And while the same technical objection does not apply to civil prosecutions, the injection of the rule of reasonableness or unreasonableness would lead to the greatest vari-

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ableness and uncertainty in the enforcement of the law. The defenses of reasonable restraint would be made in every case and there would be as many different rules of reasonableness as cases, courts, and juries. What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of *People v. Sheldon*, 139 N. Y. 264, Chief Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, *the only sure remedy is to prohibit all agreements of that character.* If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' * * * To amend the Anti-Trust Act, as suggested by this bill, would be to entirely emasculate it, and for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain and highly remedial. It practically covers the field of Federal jurisdiction, and is in every respect a model law. To destroy or undermine it at the present juncture, when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity."

The result was the indefinite postponement by the Senate of any further consideration of the proposed amendments of the Anti-Trust Act.

After what has been adjudged, upon full consideration, as to the meaning and scope of the Anti-Trust Act, and in view of the usages of this court when attorneys for litigants have attempted to reopen questions that have been deliberately decided, I confess to no little surprise as to what has occurred in the present case. The court says that the previous cases, above cited, "cannot by any possible conception be treated as authoritative without the certitude that *reason* was resorted to for the purpose of deciding them." And its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason," or "the light of reason." It is more than once intimated, if not suggested, that if the Anti-Trust Act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or

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unreasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court [99] was delivered by a justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States and lawyers who were recognized, on all sides, as great leaders in their profession. The same eminent jurist who delivered the opinion in the *Trans-Missouri* case delivered the opinion in the *Joint Traffic Association* case, and the association in that case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the justice who expressed the views of the court, or of the ability of the profound, astute lawyers, who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words, would amount to "judicial legislation"? Now this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered, the first inquiry will be, that as the court is unanimous in holding that the particular things done by the Standard Oil Company and its subsidiary companies, in this case, were illegal under the Anti-Trust Act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which, in frankness, can be given to this question is, that the court intends to decide that its deliberate judgment, fifteen

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years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with [100] the "rule of reason." In effect the court says, that it will now, for the first time, bring the discussion under the "light of reason" and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

Still more, what is now done involves a serious departure from the settled usages of this court. Counsel have not ordinarily been allowed to discuss questions already settled by previous decisions. More than once at the present term, that rule has been applied. In *St. Louis, I. M. & S. Ry. Co. v. Taylor*, 210 U. S. 281, 295, the court had occasion to determine the meaning and scope of the original Safety Appliance Act of Congress passed for the protection of railroad employees and passengers on interstate trains. 27 Stat. 531, § 5, c. 196. A particular construction of that act was insisted upon by the interstate carrier which was sued under the Safety Appliance Act; and the contention was that a different construction, than the one insisted upon by the carrier, would be a harsh one. After quoting the words of the act, Mr. Justice Moody said for the court:

"There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to *supplant the qualified duty of the common law with an absolute duty deemed by it more just*. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking [101] body.*"

* * * It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main help-

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less in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case."

And at the present term of this court we were asked, in a case arising under the Safety Appliance Act, to reconsider the question decided in the *Taylor case*. We declined to do so, saying in an opinion just now handed down:

"In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act, so far as it relates to automatic couplers on trains moving in interstate traffic, as open to further discussion here. *If the court was wrong in the Taylor case the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper.* This court ought not now to disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the Safety Appliance Act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the *Taylor case*, this court will adhere to and apply that rule." *C., B. & Q. Ry. Co. v. United States*, 220 U. S. 559.

When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the Anti-Trust Act as would allow reasonable restraints of interstate commerce, this [102] court, in deference to established practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce among the States and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress and obtain an amendment of the Anti-Trust Act if they think this court was

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wrong in its former decisions; and (5) this court cannot and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law. Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations, and trusts in restraint of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraints of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer, more fully than I have heretofore done, to another, and, in my judgment—if we look to the future—the most important aspect of this case. That

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aspect concerns the usurpation by the judicial branch of the Government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions, deemed no part of the National Constitution of more consequence or more essential to the permanency of our form of government than the provisions under which were distributed the powers of Government among three separate, equal and coördinate departments—legislative, executive, and judicial. This was at that time a new feature of governmental regulation among the nations of the earth, and it is deemed by the people of every section of our own country as most vital in the workings of a representative republic whose Constitution was ordained and established in order to accomplish the objects stated in its preamble by the means, *but only by the means*, provided either expressly or by necessary implication, by the instrument itself. No department of that Government can constitutionally exercise the [104] powers committed strictly to another and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by "*judicial legislation*," read words into the Anti-Trust Act not put there by Congress, and which, being inserted, give it a meaning which the words of the act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the ex-

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pression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to *amend* legislative enactments. "What is termed the policy of the Government with reference to any particular legislation," as this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden v. Collector*, 5 Wall. 107. Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating [105] the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.

After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States—the source of all national power—shall, in their own time, upon reflection and through the legislative department of the Government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the States without being subject to governmental authority. But that would not be liberty, regulated by law, and liberty, which cannot be regulated by law, is not to be desired. The supreme law of the land—which is binding alike upon all—upon Presidents, Congresses, the courts, and the people—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that

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is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. *Boyd v. United States*, 116 U. S. 616, 635. We shall do well to heed the warnings of that great jurist.

[106] I do not stop to discuss the merits of the policy embodied in the Anti-Trust Act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the Government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the Anti-Trust Act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

UNITED STATES OF AMERICA *v.* AMERICAN
TOBACCO COMPANY.*

AMERICAN TOBACCO COMPANY *v.* UNITED
STATES OF AMERICA.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 118, 119. Argued January 3, 4, 5, 6, 1910; restored to docket for re-argument April 11, 1910; re-argued January 9, 10, 11, 12, 1911.—Decided May 29, 1911.

[221 U. S., 106.]

Standard Oil Co. v. United States, ante, p. 1, followed and reaffirmed as to the construction to be given to the Anti-Trust Act of July 2,

* For opinion of Circuit Court (164 Fed. Rep. 700), see vol. 3, p. 427.

For injunction provisions of final decree, entered on mandate of the Supreme Court, see *post*, p. 246.

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1890, c. 647, 26 Stat. 209; and held that the combination in this case is one in restraint of trade and an attempt to monopolize the business of tobacco in interstate commerce within the prohibitions of the act.*

[107] In order to meet such a situation as is presented by the record in this case and to afford the relief for the evils to be overcome, the Anti-Trust Act of 1890 must be given a more comprehensive application than affixed to it in any previous decision.

In *Standard Oil Co. v. United States*, ante, p. 1, the words "restraint of trade" as used in § 1 of the Anti-Trust Act were properly construed by the resort to reason; the doctrine stated in that case was in accord with all previous decisions of this court, despite the contrary view at times erroneously attributed to the expressions in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and *United States v. Joint Traffic Association*, 171 U. S. 505.

The Anti-Trust Act must have a reasonable construction as there can scarcely be any agreement or contract among business men that does not directly or indirectly affect and possibly restrain commerce. *United States v. Joint Traffic Association*, 171 U. S. 505, 568.

The words "restraint of trade" at common law, and in the law of this country at the time of the adoption of the Anti-Trust Act, only embraced acts, contracts, agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade, and Congress intended that those words as used in that act should have a like significance; and the ruling in *Standard Oil Co. v. United States*, ante, p. 1, to this effect is reexpressed and reaffirmed.

The public policy manifested by the Anti-Trust Act is expressed in such general language that it embraces every conceivable act which can possibly come within the spirit of its prohibitions, and that policy cannot be frustrated by resort to disguise or subterfuge of any kind.

The record in this case discloses a combination on the part of the defendants with the purpose of acquiring dominion and control of interstate commerce in tobacco by methods and manners clearly within the prohibition of the Anti-Trust Act; and the subject-matters of the combination and the combination itself are not excluded from the scope of the act as being matters of intrastate commerce and subject to state control.

In this case the combination in all its aspects both as to stock ownership, and as to the corporations independently, including foreign corporations to the extent that they became coöperators in the com-

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bination, come within the prohibition of the first and second sections of the Anti-Trust Act.

In giving relief against an unlawful combination under the Anti-Trust Act the court should give complete and efficacious effect to the [108] prohibitions of the statute; accomplish this result with as little injury as possible to the interest of the general public; and have a proper regard for the vested property interests innocently acquired.

In this case the combination in and of itself, and also all of its constituent elements, are decreed to be illegal, and the court below is directed to hear the parties and ascertain and determine a plan or method of dissolution and of recreating a condition in harmony with law, to be carried out within a reasonable period (in this case not to exceed eight months), and, if necessary, to effectuate this result either by injunction or receivership.

Pending the achievement of the result decreed all parties to the combination in this case should be restrained and enjoined from enlarging the power of the continuation by any means or device whatever. Where a case is remanded, as this one is, to the lower court with directions to grant the relief in a different manner from that decreed by it, the proper course is not to modify and affirm, but to reverse and remand with directions to enter a decree in conformity with the opinion and to carry out the directions of this court with costs to defendants.

184 Fed. Rep. 700, reversed and remanded with directions.

The facts, which involve the construction of the Anti-Trust Act of July 2, 1890, and the question whether the acts of the defendants amounted to a combination in restraint of interstate commerce in tobacco, are stated in the opinion.

The Attorney General and Mr. James O. McReynolds for the United States:

What constitutes or materially affects interstate or foreign commerce is a practical question to be decided upon a view of the facts presented in each case. *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *International Text Book Co. v. Pigg*, 217 U. S. 91; *Dozier v. Alabama*, 218 U. S. 124. In the constantly recurring course of affairs commerce among the States passes through three stages: soliciting orders; manufacturing the goods; transporting them to the purchaser. And each is an essential of the entire movement. Soliciting orders undoubt-

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edly is inter[100]state commerce, *Robbins v. Shelby County*, 120 U. S. 489. Transporting the manufactured article likewise is clearly of the same. The manufacture is as essential as either of the other elements; and some restrictions upon it, as all know, affect the very foundations of interstate trade.

The commerce clause gives Congress power to indicate its will in conformity to which interstate commerce shall be carried on. This is supreme and admittedly extends to whatever is itself interstate commerce, and all instrumentalities and persons engaged therein. Legislation which directly regulates any of these things comes clearly within the constitutional grant. *Delaware & Hudson R. R. Co. v. United States*, 212 U. S. 366. And, consequently, whenever manufacture can be regarded as a part of such commerce Congress may inhibit a monopoly thereof, as in so doing it would be directly regulating commerce.

The granted power may be made effective by all means reasonably necessary therefor. Experience demonstrates that the indicated will of Congress concerning interstate trade and commerce may be directly hindered, obstructed and nullified by some things which are no part thereof. Whatever of these, therefore, as an efficient cause will probably occasion as a natural and reasonable consequence material obstruction or hindrance to the efficacious operation of its lawful will, Congress may prohibit. A monopoly of production, as the efficient cause, may occasion material hindrance or obstruction to such operation of the indicated will of Congress, and in that event may be prohibited because of this effect although manufacture be regarded as no part of commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 195, 208, 209; *United States v. Coombes*, 12 Pet. 72, 78; *The Daniel Ball*, 10 Wall. 557.

Where matters of economic opinion or theory are elements for consideration and conclusions depend thereon, the courts must accept whatever declaration Congress has [110] made in respect of them, and frame their judgments in harmony therewith, unless such declaration is plainly without reasonable foundation. *National Cotton Oil Co. v. Texas*, 197 U. S. 115.

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Contracts, combinations, conspiracies and monopolies which directly and materially hindered or obstructed interstate or foreign commerce were unlawful prior to the act of July 2, 1890.

The principles of the common law are applicable to interstate commerce transactions. *Western Union Telegraph Company v. Call*, 181 U. S. 92, 102. Without congressional enactment, every contract, combination, conspiracy or monopoly, unlawful at common law, would be so regarded by the Federal courts although relating solely to interstate or foreign commerce; and certainly no affirmative aid would be given to the purposes of any of them.

Congress has power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Except as limited by other provisions, this power is supreme and cannot be abridged by State, individual or corporation.

Inaction by Congress indicates its will that interstate and international commerce shall be free; and therefore whatever substantially obstructs, interferes with or hampers such commerce conflicts with the will of Congress and the Federal Constitution. *Leisy v. Hardin*, 135 U. S. 100; *Re Rahrer*, 140 U. S. 545; *Rhodes v. Iowa*, 170 U. S. 412; *Adams Express Co. v. Kentucky*, 206 U. S. 129, 135; *Atlantic Coast Line v. Wharton*, 207 U. S. 328, 334; *Adams Express Co. v. Kentucky*, 214 U. S. 218.

The doctrine that inaction by Congress is equivalent to a positive declaration that commerce shall be free and untrammelled and that whatever substantially interferes with or hampers the same is in conflict with the Constitution of the United States rests upon the intention of [111] Congress reasonably implied from its silence in respect to the subject of commerce. *Bowman v. Chicago &c. R. R. Co.*, 125 U. S. 465, 482.

Contracts, combinations, conspiracies and monopolies may and often do prevent the free flow of commerce—substantially obstruct, interfere with and hamper the same. *Addyston Pipe case*, 175 U. S. 211; *Loewe v. Lawlor*, 208 U. S. 274.

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If state legislation which substantially hinders or obstructs commerce is invalid, because in conflict with the contrary intention of Congress reasonably implied from silence, *a fortiori* is this true of any arrangements by corporations which bring about like results.

In the absence of express legislation any contract, combination, or other arrangement by corporations which directly and materially hinders, restrains or obstructs the free flow of interstate or foreign commerce would be unlawful. *Re Debs*, 158 U. S. 564, 577, 599; *Union Bridge Co. v. United States*, 204 U. S. 384; *Galveston R. R. v. Texas*, 210 U. S. 217; *Caldwell v. North Carolina*, 187 U. S. 622. How far the courts, in the absence of a statute, could prevent and restrain such obstructions, or whether parties thereto might be prosecuted criminally, it is not necessary to discuss, since the Anti-Trust Act now clearly applies to them.

The anti-trust provisions of the Wilson Tariff Act (1894) apply to any combination or agreement intended to restrain free competition when one of the parties is engaged in importing.

These provisions have not been construed by this court. They denounce every combination, one party to which is engaged in importing, when intended to restrain lawful commerce or free competition therein. The language differs somewhat from the Sherman Act, not improbably because of prior opinions in the lower Federal courts. *Re Greene*, 52 Fed. Rep. 104; *United States v. Trans-Missouri* [112] *Freight Assn.*, 58 Fed. Rep. 40; 58 Fed. Rep. 58; *United States v. E. O. Knight Co.*, 60 Fed. Rep. 934.

The Sherman Act prescribes the rule of free competition in its broad and general sense and denounces contracts, combinations and conspiracies in whatever form which in effect or necessary tendency directly and materially obstruct interstate or foreign commerce. The natural effect of competition is to increase commerce; to extinguish or prevent the free play of competition is to hinder it.

The rights of an individual acting alone are not involved in the present controversy. (Concurring opinion of Justice Brewer in *Northern Securities case*.)

The record reveals gross violations of the anti-trust statutes within any construction consistent with repeated deci-

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sions of this court; if limited to unreasonable restraints the present case would be clearly within them. And if duress, and wicked and unfair methods are essential, they all appear.

Interstate commerce is a term of very large significance. It comprehends intercourse for the purposes of trade in any and all forms, including transportation, purchase, sale and exchange of commodities between citizens of different States. Regulation and commerce are both practical conceptions, and their limits must be fixed by practical lines. *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Caldwell v. North Carolina*, 187 U. S. 622, 632; *Montague & Co. v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *Galveston R. R. v. Texas*, 210 U. S. 217, 225.

The anti-trust laws must be reasonably construed with a view to practical enforcement, and not so as to defeat the purposes leading to their enactment. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd [113] conclusion." *Lau Ow Bew v. United States*, 144 U. S. 47, 59; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 567; *Hopkins v. United States*, 171 U. S. 578, 600; *Anderson v. United States*, 171 U. S. 604, 616; *Swift & Company v. United States*, 196 U. S. 375, 396; *Cincinnati Packet Company v. Bay*, 200 U. S. 179, 184.

The general principles adopted in reference to state legislation affecting interstate commerce are applicable for determining whether combinations of corporations or individuals materially affect the free flow of such commerce. The validity of such state legislation turns upon whether its direct effect or necessary tendency is the material or substantial restraint, hindrance or obstruction of commerce. If so, it is unconstitutional irrespective of intent. But if the effect is only immaterial and incidental this does not invalidate. *Asbell v. Kansas*, 209 U. S. 251, 256; *Galveston & Co. R. R. v. Texas*, 210 U. S. 217, 227; *Minnesota v. Barber*, 186 U. S. 313, 319; *Richmond & Co. R. R. Co. v. Patterson*, 169 U. S. 311, 314; *Chicago & Co. R. R. v. Solan*, 169 U. S. 133; *Missouri & Co. R. R.*

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v. Haber, 169 U. S. 613, 626; *Bowman v. Chicago &c. R. R. Co.*, 125 U. S. 465, 482; *Smith v. Alabama*, 124 U. S. 465, 478.

The Sherman Act applies when the direct result or necessary tendency of the prohibited thing—contract, combination, etc.—is material obstruction, hindrance or restraint of interstate or foreign commerce. This thing need not be any part of commerce, nor be done by parties engaged therein. And whether such obstruction, hindrance, restraint or tendency exists must be determined by the court upon the facts of each case. That which did not restrain commerce fifty years ago may do so to-day. *Loewe v. Lawlor*, 208 U. S. 274, 298; *Union Bridge Company v. United States*, 204 U. S. 364, 400; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 518, and 18 How. 421.

The settled rule, and one constantly invoked by those engaged in interstate commerce, is that any state statute [114] which in effect or necessary tendency directly and materially obstructs or hinders the free flow of interstate commerce conflicts with the Federal Constitution. Certainly one purpose of the Sherman Act was to prevent any such interference with commerce through contracts, combinations, conspiracies or monopolies (*Loewe v. Lawlor*), and if state statutes are cut down because of congressional intent inferred from silence, there can be no question of the power of Congress by a positive enactment to destroy obnoxious arrangements amongst individuals or corporations. The interpretation of the Sherman Act expounded in the unanimous opinion in *Loewe v. Lawlor* supports this suggestion.

The natural effect of competition in its broad and legitimate sense is to increase trade. To suppress such competition restrains, hinders and obstructs trade within the meaning of the Anti-Trust Act. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Northern Securities Co. v. United States*, 193 U. S. 197; *United States v. Standard Oil Co.*, 178 Fed. Rep. 177. This rule is especially rigid in respect of public service corporations. *Gibbs v. Consolidated Gas Co.*, 180

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U. S. 396; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; but it is applicable to all commerce,

Persons of sound mind are presumed to intend the necessary or ordinary consequences of their acts, *Clarion Bank v. Jones*, 21 Wall. 325, 337; and, in general, the intent consciously entertained or dominant in the minds of parties to a combination is not material—certainly not decisive of its legality. Where attempts to monopolize are charged, or where essential to show a plan not necessarily inferred from circumstances, or where the effect of established acts may be doubtful, the actual purpose may be material—perhaps essential. *United States v. Trans-Mo. Ft. Assn.*, 166 U. S. 290, 341, 342; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 284; *Swift & Co. v. United States*, 196 U. S. 375, 396.

The fundamental design of the anti-trust legislation is not punishment of immorality, but prevention of mischief consequent upon unification of control and destruction of competition. The public is chiefly concerned about practical results—not mental attitudes. The lawfulness of a combination cannot be determined by the conscious purpose of the parties; necessary consequences are presumed to have been intended. *United States v. Trans-Mo. Ft. Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 562; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 234.

The word "unreasonable" cannot be read into the first section of the Sherman Act; but this does not render the prohibitions applicable merely because commerce is in some way affected, or to transactions always enforceable, and never regarded as objectionable from any standpoint. This court has never declared unlawful those ordinary business arrangements always sanctioned at common law and wholly outside the mischief intended to be prevented. Any act, however, although entirely innocent when standing alone may be criminal if part of an unlawful plan. *United States v. Joint Traffic Assn.*, 171 U. S. 505, 567, 568; *Hopkins v. United States*, 171 U. S. 578, 600; *Aikens v. Wisconsin*, 195 U. S. 184, 205; *Swift & Company v. United States*, 196 U. S. 375, 396; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179.

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The Government does not maintain that restraint, obstruction or hindrance of commerce is denounced by the act unless direct and material either in tendency or effect; and, of course, do not insist that every contract or arrangement which merely eliminates a competitor in interstate trade is for that sole reason unlawful. The statute was intended to foster, not destroy, business operations [116] universally regarded as promotive of public welfare. The suggestion that the statute denounces as criminal every party to any sort of contract which eliminates any independent dealer in interstate commerce however insignificant is untenable. But when, as in the present case, the restraint is the direct consequence of or that to which the challenged contract or combination necessarily tends, and is also of a material or substantial character it is clearly within the prohibition. The Government does not avouch and will not attempt to support this extreme construction which was adopted by the presiding judge below.

Contracts, combinations or conspiracies which give power materially to restrain commerce and indicate a dangerous probability of its exercise and those which necessarily tend to monopoly are unlawful without more. *United States v. E. C. Knight Co.*, 156 U. S. 1; *United States v. Trans-Missouri Ft. Assn.*, 166 U. S. 290; *Northern Securities Company v. United States*, 198 U. S. 197; *United States v. Standard Oil Co.*, 173 Fed. Rep. 177. The essential purpose of the statute is to prevent injury—not merely to reverse a course of conduct.

The words, "contract, combination and conspiracy" in the statute are used in their ordinary sense, and there is no exception in favor of sales, conveyances or other executed arrangements. *Pettibone v. United States*, 148 U. S. 197, 203; *Noyes on Intercorporate Relations*, §§ 824 *et seq.*

The decision in *United States v. E. C. Knight Company* turned upon the conclusion that under the peculiar circumstances of that case what was alleged and proved did not show a direct or necessary obstruction to interstate commerce; and it may be relied upon only where the evidence requires a like finding on that point. The facts of the pres-

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ent case render such a conclusion impossible. The things done had direct reference to interstate and foreign [117] commerce; competition therein has been effectively destroyed and monopoly secured. In support of the foregoing doctrines, see *United States v. E. C. Knight Company* (1895), 156 U. S. 1; *Pearsall v. Great Northern R. R. Co.* (1896), 161 U. S. 646; *United States v. Trans-Missouri Freight Assn.* (1897), 166 U. S. 290; *United States v. Joint Traffic Assn.* (1898), 171 U. S. 505; *Hopkins v. United States* (1898), 171 U. S. 578; *Anderson v. United States* (1898), 171 U. S. 604; *Addyston Pipe & Steel Company v. United States* (1899), 175 U. S. 211; *Montague & Company v. Lowry* (1903), 193 U. S. 38; *Northern Securities Company v. United States* (1904), 193 U. S. 197; *Harriman v. Northern Securities Company* (1905), 197 U. S. 244; *Swift & Company v. United States* (1905), 198 U. S. 375; *Cincinnati et al. Packet Co. v. Bay* (1906), 200 U. S. 179; *Loewe v. Lawlor* (1908), 208 U. S. 274. See also *National Cotton Oil Co. v. Texas*, 197 U. S. 115; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227; *Pennsylvania Sugar Refining Company v. American Sugar Refining Co.*, 166 Fed. Rep. 254; *Bigelow v. Calumet & Hecla Mining Company*, 167 Fed. Rep. 704, 721; *National Fireproofing Company v. Mason Builders Assn.*, 169 Fed. Rep. 259; *United States v. Standard Oil Co.*, 173 Fed. Rep. 177.

Monopoly is the outcome of the practical cessation of effective business competition. This word in the Anti-Trust Act has no reference to a grant of special privileges but is used in a broad sense. Trade and commerce in any commodity are monopolized whenever as the result of the concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) acting in concert practically acquire power to control prices and smother competition.

The rights of an individual acting alone are not involved and it is unnecessary to inquire how far his acts [118] may be limited. Corporations do not have all the con-

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stitutional rights of an individual and are themselves combinations subject to the rules of law applicable to acts done in concert.

The word "monopolize" has no reference to a governmental grant. Congress was striking at an existing evil—unification of control with consequent destruction of competition through powerful organizations. The essential idea of monopoly is ability to control prices or to deprive the public of advantages flowing from free competition. Whether the power has been actually exercised, or prices or the total volume of trade increased or diminished is immaterial; and its existence must be determined by practical consideration of existing conditions, giving due weight to the peculiarities of the commerce involved. It is certain that where parties have deliberately pursued a course, the ordinary result or necessary tendency of which is monopoly, they cannot be heard to deny an unlawful intent; and a monopoly acquired through contract, combination or conspiracy which directly and essentially destroys competition clearly is unlawful. *United States v. Trans-Mo. Ft. Assn.*, 166 U. S. 290; *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Swift & Co. v. United States*, 196 U. S. 375.

The courts have long referred to "monopoly" the outcome of individual action as distinguished from governmental grant, and have declared unlawful every arrangement tending thereto. The word in the Sherman Act has the same significance as in the well-known opinions, from *Mitchell v. Reynolds*, 1 P. Williams, 181, to *Continental Wall Paper Co. v. Voight*, 212 U. S. 227; *United States v. Addyston Pipe Co.*, 85 Fed. Rep. 271; *United States v. E. C. Knight Co.*, 156 U. S. 1, 16; *Pearsall v. Great Northern Railway Co.*, 161 U. S. 644; *United States v. Freight Association*, 166 U. S. 290, 323; *National Cotton Oil Co. v. Texas*, 197 U. S. 115; *Shawnee Compress Co. v. Anderson*, [119] 209 U. S. 423, 438; *People v. North River Sugar Refining Co.*, 54 Hun, 354; *American Biscuit Co. v. Klotz*, 44 Fed. Rep. 721, 724; *Richardson v. Buhl*, 77 Michigan, 632; *Pocahontas Coke Co. v. Powhatan C. & C. Co.*, 60 W. Va. 508; *Harding v. American Glucose Co.*, 182 Illinois, 619, 620; *Noyes on Intercorporate*

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Reis., §§ 329 *et seq.*, 389; Andrews, Amer. Law (2d Ed.) Vol. I, 773.

The legislation against combinations and monopolies cannot be defeated by causing a corporation to acquire the shares or property and business of competing corporations; nor by any other scheme or device.

Corporate combinations which bring about the results denounced by the statute are unlawful. They are in fact more injurious to the public than the old forms of simple agreement among separate concerns or the well-known trust forms. Eddy on Combinations, Vol. I, §§ 617, 620 *et seq.*; Noyes on Intercorporate Relations, § 307; *Distillery Co. v. People*, 156 Illinois, 448.

If the corporate form of combination is beyond the reach of Congress, it lacks supreme power to regulate commerce. Certainly a corporation, a mere creature of state law, cannot be endowed with power to obstruct commerce not possessed by the State itself. *Deb's case*, 158 U. S. 564; *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Northern Securities case*, 193 U. S. 197.

The right to buy, sell and transfer property is not superior to the right to make other contracts; and all are subordinate to the power of Congress to regulate commerce. *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Northern Securities Co. v. United States*, 193 U. S. 197; *Swift & Co. v. United States*, 196 U. S. 396; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Armour Packing Co. v. United States*, 209 U. S. 56; *United States v. Del. & Hud. R. R. (Commodities Clause case)*, 212 U. S. 366; *Natl. Harrow Co. v. Hench*, 83 Fed. Rep. 36; *S. C.*, 84 Fed. Rep. 226.

A corporation which, not as an incident to orderly [120] growth, secures control of competitors by purchasing their shares or property and business and thereby acquires power to suppress competition is no less inimical to public interests than a technical "Trust," and indeed is often a mere modification thereof. The direct, necessary result of such an arrangement is to hinder and obstruct commerce. The *Pearshall case*, 161 U. S. 644; *Northern Securities case*, 193 U. S. 344; *Shawnee Compress case*, 209 U. S. 423; *Distillery Co. v.*

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People, 156 Illinois, 448, 491. *In re Greene*, 52 Fed. Rep. 104, and the *E. O. Knight case*, if to the contrary, must be considered disapproved.

There is no foundation for the claim that the Sherman Act was directed only against contracts and combinations of an executory nature, and is without application where transfers of property have been actually executed. It was intended to, and does, prohibit *obstructions* to commerce whether resulting from executory or executed arrangements. *Northern Securities case*, 193 U. S. 197; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *People v. Chicago Gas Trust*, 130 Illinois, 268; *Distillers & Cattle Feeding Co. v. The People*, 156 Illinois, 448; *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508; *Eddy on Combinations*, § 622; *Noyes on Intercompany Relations*, §§ 354, 386.

A foreign corporation doing business within the United States has no right to violate its policy or laws. An agreement or combination which in purpose or effect conflicts therewith, although actually made in a foreign country where not unlawful, gives no immunity to parties acting here in pursuance of it.

If Congress is powerless to prevent wrongs in its own jurisdiction, when the actors are foreigners, or when done in pursuance of agreements made abroad, its sovereignty is a myth.

A crime is committed within the jurisdiction where the act of the parties actually takes effect, although the instrumentalities may have been set in motion in another jurisdiction. *Re Palliser*, 136 U. S. 256, 265; *Horner v. United States*, 143 U. S. 207; *Benson v. Henkel*, 198 U. S. 1; *Burton v. United States*, 202 U. S. 344, 387; *United States v. Thayer*, 209 U. S. 39, 44.

The courts should enforce the anti-trust legislation by all appropriate processes known to their usages; and decrees should be so moulded as to suppress effectually the mischief consequent upon unlawful arrangements.

Congress has forbidden monopolies and combinations. When one exists everything done in furtherance of its purpose is unlawful; especially every act constituting a part of

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interstate or foreign commerce. Therefore the privilege of engaging therein may be denied. The power to regulate extends to prohibition of anything directly conflicting with the will of Congress lawfully expressed. *Northern Securities Co. v. United States*, 198 U. S. 197; *Champion v. Ames (Lottery case)*, 188 U. S. 321; *United States v. D. & H. Co.*, 213 U. S. 366; *Loewe v. Lawlor*, 208 U. S. 274.

The statute requires the court "to prevent and restrain violations"—not merely to determine the legality of past transactions. The public interest is the thing to be subserved, and it demands the destruction of existing mischief and prevention of impending wrongs—the removal of obstruction existing or threatened.

Where an unlawful corporate combination exists and identity of constituents has been destroyed, or where one corporation has acquired a forbidden monopoly, there are two possible effective remedies. The first is to enjoin the corporation from doing interstate or foreign business until (if ever) it can affirmatively show that its affairs have been readjusted so as to render future operations lawful. The second is to appoint a receiver to take possession of the concern and by proper action restore opportunities for free competition. *Deb's case*, 158 U. S. 564; *Chicago, [122] Rock Island &c. Ry. v. Union Pacific Ry.*, 47 Fed. Rep. 15, 26; *Stockton, Atty.-Genl., v. Central R. R. Co.*, 50 N. J. Eq. 52, 489; *Taylor v. Simon*, 4 Mylne & Craig, 141; Pomeroy on Eq. Juris., 2d Ed., §§ 111, 170.

The Government established violations of the Sherman Act by proving first, the existence of contracts, combinations, conspiracies and monopolies; and, second, that the direct result or necessary tendency of these is materially to obstruct, hinder and burden the free flow of interstate and foreign commerce.

The *Knight case* is not controlling; the combinations established here directly and materially affect not only the production and manufacture, but every department of trade and commerce in tobacco; and the results have been destruction of competition in such commerce and monopolies by defendants.

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The purposes of anti-trust legislation cannot be frustrated by operating through a corporation, nor by means of executed sales and transfers of property. *The Northern Securities Co. v. United States*, 193 U. S. 197; *Harriman v. Northern Securities Co.*, 197 U. S. 244, seem decisive on this point.

Moreover, if important, the evidence clearly establishes that the defendants' actions have been characterized by duress, and unfair and oppressive methods; and that following a fixed plan they have sought to suppress competition and secure monopolies.

The decree below was right in so far as it enjoined acts in furtherance of the combination; enjoined the control of certain defendant corporations by others through stock ownership; and also in so far as it prohibited the American Tobacco Company and other defendants adjudged to be in and of themselves combinations in restraint of trade from engaging in interstate or foreign commerce.

The decree below did no more than was necessary to destroy the unlawful combinations and prevent violations [123] of the act—in fact it did not go far enough. Prohibition of acts in furtherance of the combination and also of control by one corporation of another is abundantly supported by *The Northern Securities Co. v. United States*; *Swift & Co. v. United States*, and *United States v. D. & H. R. R.*

That part of the decree which adjudges the American Tobacco Company and others unlawful combinations and enjoins them from engaging in commerce is novel—apparently without a direct precedent; but it harmonizes with the duty to enforce the act. *Swift & Co. v. United States*, *supra*.

The petition should not have been dismissed as to the individual defendants.

In order effectually to destroy combinations the intelligent manipulators of corporate agencies must be reached.

Observance and every act done in pursuance of the English contracts within the United States are unlawful; and the petition was wrongfully dismissed as to the Imperial Tobacco Company, British-American Tobacco Company and domestic corporations controlled by the latter.

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The effect of the agreements entered into in England between the American combination and the Imperial Tobacco Company was to suppress competition between those two great concerns both within and without the United States. The British-American Tobacco Company was brought into existence as the instrumentality for making the agreements effective. The result of the whole arrangement was to destroy competition, and inevitably tends to monopoly. Observance of these arrangements should have been prohibited. The British-American Tobacco Company should have been enjoined from doing business within the United States; and the same prohibition should have been applied to the Imperial Tobacco Company during the continuation of the unlawful contracts.

The petition should not have been dismissed as to the [124] United Cigar Stores Company. This concern is one of the instrumentalities in the hands of the American Tobacco Company for carrying out its unlawful purposes, and the connection between them should have been severed.

The final decree should have been adjudged that defendants were attempting to monopolize, and had monopolized, a part of interstate and foreign commerce.

Monopoly is a practical conception, and its existence must be determined in view of business conditions. The evidence abundantly establishes that the defendants have acquired power to control prices and smother competition.

The final decree should have enjoined corporations holding shares of others from collecting dividends thereon.

This relief was granted in the *Northern Securities case*, and is an appropriate way to destroy the relationship where one corporation improperly controls another by stock ownership.

Mr. John G. Johnson, Mr. DeLancey Nicoll and Mr. Junius Parker, with whom *Mr. William J. Wallace* and *Mr. W. W. Fuller* were on the brief, *Mr. William M. Ivins* also filing a brief, for the American Tobacco Company and all the other defendants except the Imperial Tobacco Company

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(of Great Britain and Ireland), Limited, United Cigar Stores Company and R. P. Richardson, Jr., & Co., Inc.:

The transactions principally complained of by the Government in this bill involve the validity of one or the other of the two following transactions, to-wit: (a) Consolidation of manufacturing interests through the formation of the corporation and the transfer to it of the properties in such manufacturing industries for exchange of stock of the vendee corporation or for cash; (b) purchase by a corporation engaged in manufacturing of the property of a competitor, or through the purchase by such corporation of whole or part of the stock of the corporation of such [125] competing corporation, generally for cash. These transactions are not within the operation of the Sherman Law, because they primarily affect manufacturing and not commerce. *Veazie v. Moor*, 14 How. 568; *County of Mobile v. Kimball*, 102 U. S. 691; *Coe v. Errol*, 116 U. S. 517; *Turpin v. Burgess*, 117 U. S. 504; *Kidd v. Pearson*, 128 U. S. 1; *In re Greene*, 52 Fed. Rep. 104; *United States v. Knight*, 156 U. S. 1.

The *Knight case* was not a sporadic decision of this court, but was the logical outcome of the cases that preceded it that have just been cited, and it has not been overruled or modified by any subsequent decision, but has been expressly recognized wherever mentioned. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Montague v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Loewe v. Lamlor*, 208 U. S. 274; *Northern Securities Co. v. United States*, 193 U. S. 197, 406; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227; *Ware v. Mobile County*, 209 U. S. 405; *Bigelow v. Calumet Co.*, 187 Fed. Rep., 721. Confusion has arisen and it has been assumed that the *Knight case* has been overruled or modified because of the failure to distinguish between the persons complained of and the transaction which is the basis of the complaint. The defendants in this case and the defendants in the *Knight case* were engaged in interstate commerce, but the question is not whether the defendant is engaged or not in interstate commerce, but

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whether the transaction complained of is an act of, or direct in its effect on, interstate commerce; one engaging in interstate commerce does not thereby subject himself and his whole business to the control of Congress. *Howard v. Railroad Company*, 207 U. S. 463, 502.

Any attempt to distinguish this case from the *Knight case* based upon unskillful pleading on the part of the Government in the *Knight case*, is defeated by a consideration of the record of that case on file in this court. The scope of the *Knight case* as here contended has been assumed by the law department of the Government from 1895 to 1907. Annual Reports of the Attorney General 1895, p. 13; for 1896, p. xxvii; for 1899, pp. 21 *et seq.*; for 1906, p. 7; Senate Document No. 687, 2d Session, 60th Congress, p. 27. Upon the decision in the *Knight case*, the defendants—and these defendants are only one among many in this respect—have proceeded; this adjudication of this court has become a rule of property, and to overrule it would make wrecks of these enterprises; a case of such close analogy to *ex post facto* laws is presented that the maxim of *stare decisis* becomes almost as if embodied in the Constitution itself. It is as important that the law should be settled permanently as that it should be settled correctly. *Gilbert v. Philadelphia*, 3 Wall. 718, 724; *Vale v. Arizona*, 207 U. S. 201, 205.

Without reference to whether the trade is interstate, the transactions shown by this record do not constitute contracts, combinations or conspiracies in restraint of trade, and are not against the public policy which this court has (*Northern Securities case, supra*) declared to be the purpose and effect of the Sherman Law. The intent of Congress was not to unsettle legitimate business enterprises, but rather to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. (Mr. Justice Brewer in *Northern Securities case*.) The transfer of property by purchase, sale, or consolidation, whether by the formation of partnerships, organization of corporations, or consolidation of preëxisting corporations, is not violative of the common law. See *Fairbanks v. Leary*, 40 Wisconsin, 637; *People v. North River Sugar Refining Co.*, 121 N. Y. 583;

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Frenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507; *Cameron v. Water Co.* (N. Y.), 62 Hun, 269; *Vinegar Co. v. Foshrenbush*, 148 N. Y. [187] 58; *Dittman v. Distilling Co.*, 64 N. J. Eq. 544; *Commonwealth v. Hunt*, 4 Metc. 111; *Oakdale Co. v. Garst*, 18 R. I. 484; *McCauley v. Tierney*, 19 R. I. 225; *Bohn Co. v. Northwestern Assn.*, 54 Minnesota, 228; *Monongahela Co. v. Jutte*, 210 Pa. St. 288, 300. Such transfer and consolidation is not opposed to the public policy, but is expressly authorized and facilitated by the merger statutes, of many States, and is forbidden by the statutes of none. Many of the States which authorize the merger of corporations have anti-trust statutes of the same general import as the Sherman Anti-Trust Law, and to give to the Federal Anti-Trust Statute the meaning contended for by the Government and to import that meaning into the various state anti-trust statutes would work the incongruity of assuming that the States had facilitated the formation of corporations, which by their very formation would become out-laws of commerce.

The decision of this court in *Northern Securities* case is not in conflict with the contention here made; this court in the *Northern Securities* case did not overrule or modify the declarations theretofore made, and in subsequent decisions has not recognized the *Northern Securities* case as in conflict with the contention here made. *Trans-Missouri Freight Assn. case*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *Smiley v. Kansas*, 196 U. S. 447; *National Cotton Oil Co. v. Texas*, 197 U. S. 115; *Cincinnati Packing Co. v. Bay*, 200 U. S. 179; *Chesapeake & Ohio Co. v. United States*, 115 Fed. Rep. 610, 620; *Davis v. Booth*, 131 Fed. Rep. 31, 37; *Robinson v. Brick Co.*, 127 Fed. Rep. 804; *Connor-McConnell Co. v. McConnell*, 140 Fed. Rep. 412; *aff., idem*, 987; *Fisheries Co. v. Lennen*, 116 Fed. Rep. 217; *Harrison v. Glucose Co.*, 116 Fed. Rep. 304; *National Co. v. Haberman*, 120 Fed. Rep. 415; *Bigelow v. Calumet Co.*, 167 Fed. Rep. 721. The combinations and contracts in existence at the passage of the Sherman Law, and in the contemplation of Congress in its enactment [128] were entirely distinct from those combinations of capital and ability

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which had long existed in the form of joint-stock associations or corporations or partnerships, and it is the duty of the court to apply the Sherman Law as an evolutionary statute, and not assume a revolutionary purpose in the mind of Congress in its enactment.

These defendants have not violated the Sherman Law by monopolizing trade or commerce, although they in the aggregate enjoy large, but varying, proportions of the business in the products of tobacco. Monopolizing under the Sherman Law is an activity and not a state of being, and size, and the power that is inherent in size, whether size be considered in relation to investment or to the proportion of business at the time enjoyed, is not monopolizing or an element of monopolizing. Monopoly at common law was a license or privilege for the sole buying and selling, making, working, or using of anything whatsoever, whereby the subject in general is restrained from that liberty in manufacturing or trading which he had before. 4 Blackstone, 159. Monopolizing under the statute carries with it the idea of exclusion, and whatever the magnitude of a concern may be, it is not guilty of monopolizing or attempting to monopolize unless it is doing something by which there is either attained or attempted this result, to-wit, that "the subject in general is restrained from that liberty of trading which he had before." See dissenting opinion of Mr. Justice Holmes in *Northern Securities case*, 193 U. S. 409; *In re Greene*, 52 Fed. Rep. 115; *Chemical Co. v. Providence Co.*, 64 Fed. Rep. 946, 949; *Whitwell v. Continental Tob. Co.*, 125 Fed. Rep. 462; *United States v. Reading Co.*, 183 Fed. Rep. 427. This is true not only with respect to this statute, but it is so recognized at common law and among economic writers. *Mogul Co. v. McGregor*, L. R. 23 Q. B. 598, 618; *Oakdale v. Garst*, 18 R. I. 484; Prof. Ely's "Monopolies and Trusts," 34; Clark's Control of Trusts, 6.

[129] These defendants have not, either singly or in combination, excluded or attempted to exclude anyone from trade and commerce. (a) They have not cornered nor attempted to corner the supply of raw material; it is a matter of serious doubt whether such corner or attempting to corner would fall within the inhibition of the Sherman Law, or within the con-

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stitutional power of Congress, as being an act of, or direct in its effect on, interstate commerce, even if the record disclosed it. But decisions as to those questions are not necessary to an adjudication of this case. (b) Defendants have not enjoyed rebates or other preference in transportation; (c) they have not enjoyed exclusive advantage in the use of machinery and facilities for manufacturing; (d) they have not excluded or attempted to exclude competitors from the avenues of distribution—marketing their products. It is impossible to conceive of exclusion or attempt to exclude competitors from trade that does not involve one or the other of the foregoing methods or avenues. The defendants have met active competition, and in meeting it have adopted the ordinary methods of competition. To give a construction to the Sherman Law, intended as it is to foster competition, that would forbid the usual methods of competition, would make the statute self-destructive. Competition, it is often said, is the life of trade, but the object of all competition is to drive out other competitors. To say that a man is to trade freely, but that he is to stop short of any act which is calculated to harm other tradesmen and which is designed to attract business to his own shop would be a strange and impossible counsel of perfection. The rights of competitors are different from the rights of strangers to the trade, and conduct is justified on the part of the person or corporation who seeks to build his own business that would be unlawful if adopted by him whose only motive was the injury of another. *Loewe v. Lawlor*, *supra*; *Bonsack Machine Co. v. Smith*, 70 Fed. Rep. 383, 388; [130] *Mogul Co. v. McGregor*, L. R. 23 Q. B. 598, 618; *Berry v. Donovan*, 188 Massachusetts, 353; *Barnes v. Typographical Union*, 232 Illinois, 424; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 124; *Doremus v. Hennessey*, 176 Illinois, 608; *Whitwell v. Continental Tob. Co.*, *supra*. The rights of competitors as recognized at common law include the right to undersell competitors; *Commonwealth v. Hunt* (Mass.), 4 Metc. 111, 134; *Lough v. Outerbridge*, 143 N. Y. 271, 283; to have secret partners; 1 Lindley on Part. (2d Am. Ed.), 16; *Winship v. Bank*, 5 Peters, 529, 562; to adopt a policy of business that can only result in destruction of weak compet-

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itors, even though a part of it is the sale of goods below cost; *Lough v. Outerbridge*, 143 N. Y. 271, 283; *Martel v. White*, 185 Massachusetts, 255; *Lewis v. Lumber Co.*, 121 Louisiana, 658; *Karges Co. v. Amalgamated Union*, 165 Indiana, 421; to make provision for exclusive handling; *Palmer v. Stebbins* (Mass.), 3 Pick. 188, 192; *In re Greene*, *supra*; *Whitwell v. Continental Tob. Co.*, *supra*; *Houch v. Wright*, 77 Mississippi, 476.

Purchasers of competing businesses do not constitute attempts to monopolize, for such purchases do not exclude others from the trade, but leave the field open; this is true, although the inducement to purchase is to get rid of a competitor. The law of self-defense and protection applies to one's business as well as to his person. *United Shoe Co. v. Kimball*, 193 Massachusetts, 351; *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 551; *United States Co. v. Provident Co.*, 64 Fed. Rep. 946, 950; *Butt v. Ebel*, 29 N. Y. App. Div. 256, 259; *Lanyon v. Garden City Sand Co.*, 223 Illinois, 616; *National Co. v. Cream City Co.*, 86 Wisconsin, 352. Covenants taken from a vendor not to engage in a business in competition with that sold are not only not criminal, but are altogether valid and enforceable. *Cincinnati Co. v. Bay*, 200 U. S. 179; *Fowle v. Park*, 131 U. S. 88; *Navigation Co. v. Winsor*, 20 Wall. 64; *Electric Co. v. Hawks*, 171 Massachusetts, 101.

[131] The Sherman Law properly construed and applied is a beneficent and evolutionary statute, whose purpose and effect is to preserve to every one liberty and opportunity to engage in interstate commerce—it preserves this liberty and opportunity as against the unreasonable covenants and contracts of the party himself, as well as against the tortious conduct of others, whether those others seek in combination to exclude a stranger to the combination, or seek singly to exclude him. In other words, this statute applies to interstate trade the doctrines of the common law applicable to trade and commerce, without respect to whether interstate or not, and the words used in it are well known words at common law, which must, in the interpretation of this law, be given their common law meaning. The chief purpose of

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the statute was to make certain the application in the Federal jurisdiction of the principles of the common law, and to provide definite and certain remedies for the enforcement thereof.

In addition to the considerations heretofore mentioned, this construction, and this construction alone, gives meaning and effect to every word of the statute: (a) The first section of the statute condemns *every* contract, etc., in restraint of trade—the construction contended for by the Government in this case would eliminate the word “every” from the statute and makes the test dependent not upon the nature of the act, but its magnitude or result; these defendants contend that it is the nature of the act that is the test and that *every* transaction of the prohibited nature is forbidden, whatever is magnitude, result, or intent; (b) the second section forbids the monopolizing or attempt to monopolize of *any part* of interstate trade or commerce—the Government’s intention as to the meaning of this second section eliminates these words from the statute or substitutes for them the words “in large part,” or “a dominating part”; the construction contended for by these defendants gives full force to the meaning “any part”—it is a violation of the statute to exclude or attempt to exclude by tortious means a trader from even the smallest part of interstate trade or commerce.

An additional argument in favor of the construction of the statute here contended for is seen when the remedy is considered. The court below, construing the statute as contended for by the Government, said that it condemned that incidental elimination of competition which comes from ordinary consolidation, sale, and purchase; in order to give vitality to such construction there are involved two grave constitutional questions: First: Is there a constitutional power in Congress to forbid the ordinary transactions that have characterized all commercial peoples, and that are unquestionably valid at common law? Second: Has Congress the constitutional power to prevent a state corporation from engaging in interstate commerce in wholesome products? These defendants believe that these two questions should be each answered in the negative; Congress has no right under

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its authority to regulate commerce, great and paramount as that power is, to violate the fundamental rights secured by other provisions of the Constitution. *Monongahela Co. v. United States*, 148 U. S. 312, 336; *Adair v. United States*, 208 U. S. 161, 180; *Algeyer case*, 165 U. S. 578, 589, 591. Congress has not a right to forbid corporations or natural persons from engaging in interstate commerce in wholesome products—the right of intercourse between State and State derives its source from those laws whose authority is acknowledged by civilized man throughout the world—the Constitution found it an existing right and gave to Congress only the power to regulate it. *Gibbons v. Ogden*, 9 Wheat. 1, 211; *Paul v. Virginia*, 8 Wall. 168. Corporations have this right as certainly and as thoroughly as natural persons. *Santa Clara County v. R. R.*, 118 U. S. 394, 396; Justice Field at Circuit in *Railroad Tax cases*, 13 Fed. Rep. 722, 746; *Hale v. Henkel*, 201 U. S. 43, 76, 85. The *Lottery [188] case*, 188 U. S. 321, is not in conflict with this contention, because it was based on the inherent vicious nature of the commodity involved, to-wit, lottery tickets.

It is well settled that if a statute be susceptible of two interpretations, by one of which it would be unconstitutional or of doubtful constitutional validity, and by the other valid, the latter construction should be adopted. *Commodities case*, 218 U. S. 366. The court below, however, having construed the Sherman Anti-Trust Law as forbidding the elimination of competition that results incidentally from sale, purchase and consolidation, resolved these two grave constitutional questions against the defendants, and, under the language of a statute which authorizes a court to restrain and enjoin only “violations of the act,” restrained and enjoined the assumed violators of the act from all interstate activity. It is practicable for a court to “prevent and restrain” the making or the continued operation of an executory contract or conspiracy, or combination in the nature of a contract or conspiracy; and it is practicable for a court to prevent and restrain a practice which involves monopolizing trade—toriously excluding or attempting to exclude strangers to the scheme contemplated; these are the things condemned by

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the Sherman Law; it is not practicable nor constitutional to prevent or restrain the purchaser of private property from the use of his property, or penalize such use by preventing his engaging in interstate commerce in wholesome articles. The impracticability of constitutional remedy demonstrates the unsoundness of the construction of the act contended for by the Government.

Mr. William B. Hornblower, with whom *Mr. John Pickrell*, *Mr. William W. Miller*, and *Mr. Morgan M. Mann*, were on the brief for appellee, the Imperial Tobacco Company.

By far the greater part of the testimony taken in this [184] cause has to do with the alleged combinations entered into by the American Tobacco Company and its allied companies in this country, with which the Imperial Company and the British-American Company have no concern. It is claimed, however, by the Government that certain contracts entered into by the Imperial Company in 1902 with the American Company were in violation of the Sherman Act; and that the transactions of the Imperial Company since that date have been in violation of the act. These contracts were entered into in England in the summer of 1902 for the purpose of putting an end to the ruinous competition which was being carried on in England by the Ogdens Limited owned by the American Company.

The court below was right in dismissing the bill as to the Imperial Company and as to the British-American Tobacco Company, on the ground that those companies were British companies, that the contracts to which they were parties were made in Great Britain and were valid under the laws of Great Britain, and that the Sherman Anti-Trust Act has no extraterritorial effect. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

The agreements of September 27, 1902, between the American Tobacco Company and the Imperial Tobacco Company were not in violation of the Sherman Anti-Trust Act. So far as those agreements operated to restrain trade in Great Britain or between Great Britain and countries other than

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the United States, they are not within the prohibition of the Sherman Act. So far as they operate to restrain trade between England and this country, or between the various States of this country, such restraint is merely incidental to the sale of certain plants and good will, and is not within the prohibition of the Sherman Act.

The principle that there are certain contracts in partial restraint of trade which would not be invalid at common law, and which do not come within the prohibition of the Sherman Act, has been recognized by this court in the [135] very cases which are cited by the Government as holding that all contracts in restraint of trade whether reasonable or unreasonable, are in violation of the Sherman Act. See *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 329. The same principle is recognized in *United States v. Joint Traffic Association*, 171 U. S. 505, 566; *Northern Securities Co. v. United States*, 193 U. S. 197, per Mr. Justice Brewer at p. 361; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, per Mr. Justice Holmes at p. 184.

Mr. Justice Peckham in the *Joint Traffic* case held that the statute is to have a "reasonable construction." When he states that contracts in restraint of trade are invalid under the statute, whether reasonable or unreasonable, he refers not to contracts between mercantile or manufacturing concerns, but to contracts or combinations between competing railroad corporations, all of which contracts or combinations are illegal under the statute even though the rates and fares established are reasonable. See 171 U. S. 568, 570.

The distinction between contracts affecting public service corporations, and contracts between private individuals or corporations, is well stated in *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, where it was held that a corporation cannot disable itself by contract from the performance of public duties which it has undertaken, and thereby make public accommodation or convenience subservient to its private interests, but where the public welfare is not involved, and where the restraint of one party is not greater than protection to the other party requires, the contract in restraint of trade may be sustained.

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The validity of covenants between vander and vendee, for the purpose of protecting the covenantee in the enjoyment of the legitimate fruits of the contract, have been upheld under the Sherman Act in the *Addyston Pipe case*, 85 Fed. Rep. 291, modified and affirmed without approval of the opinion below in 175 U. S. 211; *Brett v. [186] Ebel*, 29 N. Y. App. Div. 256; *Lanyon v. Garden City Sand Co.*, 223 Illinois, 616; *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454; *Bancroft & Rich v. U. S. Embossing Co.*, 72 N. H. 402; *Harbison-Walker Refractories Co. v. Stanton*, 227 Pa. St. 55.

In view of the statement of Mr. Justice Brewer in his concurring opinion in the *Northern Securities case*, 193 U. S. 361, that "Congress did not intend to reach and destroy those minor contracts in partial restraint of trade," and in view of the limitations placed upon the effect of the statute in Mr. Justice Peckham's opinion in the *Trans-Missouri case*, we may fairly assume the statement made by Mr. Justice Brewer to represent the views of this court, especially as to contracts of a mercantile character not affecting railroads or other direct instruments of commerce. The subject of contracts not in restraint of trade at common law prior to the act of 1890 is discussed by this court in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 409; *Fowles v. Park*, 131 U. S. 88-96.

The lower Federal courts have decided numerous cases both before and since the Sherman Act, upholding contracts, the avowed object of which was to buy off competition of a business rival. *Carter v. Ailing*, 48 Fed. Rep. 208; *U. S. Chemical Co. v. Provident Chemical Co.*, 64 Fed. Rep. 946; *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. Rep. 304; *National Enameling & Stamping Co. v. Haberman*, 120 Fed. Rep. 415; *Prairie v. Ferrell*, 166 Fed. Rep. 702; *Walker v. Lawrence*, 177 Fed. Rep. 863.

Contracts between parties which have for their object the removal of a rival competitor in a business are not to be regarded as contracts in restraint of trade. Contracts although in partial restraint of trade, if valid at common law,

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and if not a cover for a combination or conspiracy to raise prices, or to prevent general competition, are not invalid under the Sherman Act. This proposition [187] is clearly held by the authorities above cited from the Federal reports.

As to what contracts would not be illegal at common law as in restraint of trade, see *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Leather Cloth Co. v. Lorsest*, L. R. 9 Eq. 345; approved by this court in *Gibbs v. Consolidated Gas Co.*, 130 U. S. 896.

In *Nordenfelt v. Maxim*, *Nordenfelt Guns and Ammunition Co.*, L. R. 1894, App. Cases, 535, the House of Lords reviewed at great length and in elaborate opinions the whole subject of covenants in restraint of trade, and held unanimously that a covenant, though unrestricted as to space, was not invalid where it was shown to be no wider than was necessary for the protection of the company, nor injurious to the public interests.

The case of *Diamond Match Co. v. Roeber*, 106 N. Y. 473, establishes the proposition that in connection with the sale of a factory and the good will thereof, a covenant, practically unrestricted in time or space, not to engage in the manufacture or sale of competing articles, is not a covenant in restraint of trade. The same principle is laid down in the cases of *Hodge v. Sloane*, 107 N. Y. 244; *Leslie v. Lorillard*, 110 N. Y. 519; *Tode v. Gross*, 127 N. Y. 480; *Matthews v. Associated Press*, 136 N. Y. 333; *Oakes v. Cataragus Water Co.*, 143 N. Y. 430; *Wood v. Whitehead Brothers Co.*, 165 N. Y. 545; *New York Bank Note Co. v. Hamilton Bank Note Co.*, 180 N. Y. 280; *Anchor Electric Co. v. Hawkes*, 171 Massachusetts, 101; *United Shoe Machinery Co. v. Kimball*, 193 Massachusetts, 351; *Rakestraw v. Lanier*, 104 Georgia, 188; *Bullock v. Johnson*, 110 Georgia, 486.

The most recent decisions in the state courts in which covenants to refrain from competition have been held reasonable and lawful, are, *Freudenthal v. Espey* (Cal.), 102 Pac. Rep. 280; *Louisville Board of Underwriters v. Johnson* (Ky.), 119 S. W. Rep. 152; *Wolf v. Duluth Board of Trade* [188] (Minn.), 121 N. W. Rep. 395; *Seigal v. Marcus*, (No.

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Dak.), 119 N. W. Rep. 353; *Buckhout v. Witter* (Mich.), 122 N. W. Rep. 184; *Blume v. Home Ins. Agency* (Ark.), 191 S. W. Rep. 298; *Wooten v. Harris* (No. Car), 68 S. E. Rep. 989; *Home Telephone Co. v. North Manchester Telephone Co.* (Ind.), 92 N. E. Rep. 558; *Artistic Porcelain Co. v. Bock* (N. J.), 74 Atl. Rep. 680; *Harbison-Walker Refractories Co. v. Stanton* (Pa.), 75 Atl. Rep. 988.

As to the British-American agreement there is absolutely nothing in that agreement which prevents, or tends to prevent, any other company or companies from exporting and manufacturing tobacco to other countries than Great Britain and the United States. There is no agreement to restrict prices or to interfere in any way with free competition. The evidence shows that there has been no actual diminution in the business of exporting either leaf tobacco or manufactured tobacco from the United States to foreign countries by reason of the British-American agreement.

None of the decisions heretofore made by this court under the Sherman Act are applicable to the agreements here involved. The *Joint Traffic*, *Trans-Missouri* and *Northern Securities* cases dealt with agreements between railroad companies or holders of railroad stocks, the effect and intent of which were held to restrict competition between common carriers and public service corporations. They have no application to agreements between manufacturers, but are based upon the peculiar obligations of common carriers and public service corporations. The *Addyston Pipe* case, 175 U. S. 211, involved an agreement between rival and competing manufacturers that there should be no competition between them in certain States or Territories, the direct, immediate and intended effect of which agreement was the enhancement of the price.

Montague v. Lowry, 193 U. S. 38, was an agreement, the effect of which was to raise prices in the California market.

[139] The case of *Swift & Co. v. United States* involved a combination of independent meat dealers who agreed not to bid against each other in the livestock markets, to fix selling prices and to restrict shipments of meat when necessary.

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The case of *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, was a sequel of the *Addyston Pipe case*.

The case of *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, was a case where the lessor company had agreed with the lessee company not only to go out of the field of competition, and not to enter that field again, but had further agreed to render every assistance to prevent others from entering it.

The case of *Continental Wall Paper Co. v. Voight Sons*, 212 U. S. 227, was a case of an agreement between a number of manufacturers who organized a selling company through which their entire output was sold to such persons only as would enter into a purchasing agreement by which their sales were restricted. The agreement provided for sellings of jobbers at particular specified prices. The company was a selling company organized to control all the selling business of the manufacturing wall paper corporations, partnerships and persons who owned the stock of the Continental Wall Paper Company, and made separate contracts with that corporation giving it entire control of the selling business of the manufacturers.

None of the cases in this court apply to the agreements between the American and Imperial Companies, which are involved in this suit. They had no necessary effect to directly and substantially restrict free competition in any of the products of tobacco, and did not unlawfully restrain interstate commerce. *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 461.

The oral testimony shows that the agreements did not and could not, under the existing circumstances, operate to restrain trade or create a monopoly, and therefore could [140] not, and did not operate as a violation of the Sherman Anti-Trust Act. It appears from the testimony that at the time of the agreements, there was practically no exportation or importation of manufactured products between Great Britain and the United States, owing to the protective duties in this country and the differentials imposed upon imported goods in Great Britain. It was not possible to sell manufactured tobacco imported into this country in competition with

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the domestic articles of manufacture, nor was it possible to export to England and sell in competition with domestic manufacture.

So far as the bill of complaint herein avers, that there was any restraint of competition in the purchase of leaf tobacco, the evidence overwhelmingly disproves any such claim. There was no agreement, arrangement or understanding between the American Tobacco Company and the Imperial or its representatives, to refrain from active competition in the purchase of leaf tobacco. The testimony shows without any contradiction that there has been at all times active competition between the Imperial Company's agents and the agents of the American Company, and of the independent concerns, and of the "Rigi" countries in the purchase of leaf tobacco, and the testimony shows that the price of leaf tobacco has increased since the agreements between the Imperial and American Company were made, and is still increasing. The amount of the consumption of leaf tobacco and the prices paid for it have both increased since 1902 up to the present time.

No decree can be made in this suit as against the Imperial Company which will be just and equitable.

There are three possible evils aimed at by the Sherman Anti-Trust Act. First, the raising of the price of the commodity to consumers; second, the lowering of the price of raw material to producers; third, the crushing out of competitors. There is no evidence in the case at bar that the agreements between the Imperial Company and the [141] American Company which are attacked in this suit, have resulted in any one of these three evils.

There is no evidence that the price of tobacco products in any of their forms, has been raised to the consumer. So far as appears, the price has remained the same.

There is no evidence that the price to the producers of leaf tobacco has been reduced. On the contrary, the evidence is uncontradicted that the price has steadily increased.

There is no evidence that any competitor has been in any way interfered with by reason of the agreements between the Imperial Company and the American Company. Every manufacturer in the United States has been at liberty to

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manufacture and export his goods without hindrance on the part of either the Imperial or the American Company, or the British-American or any of the other defendants in this case. The agreements in this suit do not undertake to fix prices or to pool profits, or to eliminate competition in any way, or to interfere with the ordinary laws of supply and demand.

Mr. Sol M. Stroock for the United Cigar Stores Company:

The company has not violated any of the provisions of § 1 of the Sherman Anti-Trust Act. It has not made any contract, nor engaged in any combination or conspiracy restraining the interstate commerce of the other defendants or any of them; or restraining its own interstate commerce; or restraining the interstate commerce of any competitor of the other defendants, or any of them; or restraining the interstate commerce of any competitor with it.

The United Cigar Stores Company has not violated any of the provisions of § 2 of the Sherman Anti-Trust Act. It has not secured nor attempted to secure a monopoly for any of the other defendants nor combined [142] with any of the other defendants to exclude others from the field of competition with them.

It has not secured nor attempted to secure a monopoly of the retail trade for itself, nor attempted, either alone or in combination or conspiracy with the other defendants, to exclude others from the field of competition with it.

The United Cigar Stores Company has not, as an incident of obtaining a monopoly, or as part of any combination in restraint of trade, prevented vendors from engaging in the business of handling and dealing in tobacco products.

Mr. Charles R. Carruth, Mr. Charles J. McDermott, Mr. O. B. Watson, Mr. James T. Morehead and Mr. A. J. Burton for R. P. Richardson, Jr., & Company, Inc., appellee, submitted.

Mr. W. Bourke Cockran, by leave of the court, submitted a brief as *amicus curiæ*.

Mr. Thomas Thacher and Mr. J. Parker Kirlin, by leave of the court, submitted a brief as *amici curiæ* on certain questions common to this case and other pending causes.

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Mr. Chief Justice WHITE delivered the opinion of the court. .

This suit was commenced on July 19, 1907, by the United States, to prevent the continuance of alleged violations of the first and second sections of the Anti-Trust Act of July 2, 1890. The defendants were twenty-nine individuals, named in the margin,* sixty-five American [143] corporations, most of them created in the State of New Jersey, and two English corporations. For convenience of statement we classify the corporate defendants, exclusive of the two foreign ones, which we shall hereafter separately refer to, as follows: The American Tobacco Company, a New Jersey corporation, because of its dominant relation to the subject-matter of the controversy as the primary defendant; five other New Jersey corporations (*viz.*, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, and Conley Foil Company), because of their relation to the controversy as the accessory, and the fifty-nine other American corporations as the subsidiary defendants.

The ground of complaint against the American Tobacco Company rested not alone upon the nature and character of that corporation and the power which it exerted directly over the five accessory corporations and some of the subsidiary corporations by stock ownership in such corporations, but also upon the control which it exercised over the subsidiary companies by virtue of stock held in said companies by the accessory companies by stock ownership in which the American Tobacco Company exerted its power of control. The accessory companies were impleaded either because of their nature and character or because of the power exerted over them through stock ownership by the American Tobacco

* James B. Duke, Caleb C. Dula, Percival S. Hill, George Arents, Paul Brown, Robert B. Dula, George A. Helme, Robert D. Lewis, Thomas J. Maloney, Oliver H. Payne, Thomas F. Ryan, Robert K. Smith, George W. Watts, George G. Allen, John E. Cobb, William R. Harris, William H. McAllister, Anthony N. Brady, Benjamin N. Duke, H. M. Hanna, Herbert D. Kingsbury, Pierre Lorillard, Rufus L. Patterson, Frank H. Ray, Grant B. Schley, Charles N. Stotz, Peter A. B. Widener, Welford C. Reed (now deceased), and Williamson W. Fuller.

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Company and also because of the power which they in turn exerted by stock ownership over the subsidiary corporations, and finally the subsidiary corporations were impleaded either because of their nature or because of the control to which they were subjected in and by virtue of the stock ownership above stated. We append in the margin a statement showing [144] the stock control exercised by the principal defendant, the American Tobacco Company, over the five accessory corporations and also the authority which it directly exercised over certain of the subsidiary corporations, and a list showing the control exercised over the subsidiary corporations as a result of the stock ownership in the accessory corporations, they being in turn controlled as we have said by the principal defendant, the American Tobacco Company.*

* Extent of control of American Tobacco Company over the accessory corporations:

American Snuff Company: Of 120,000 shares of preferred stock owns 12,517 shares directly and 11,274 shares by reason of stock control of P. Lorillard Co., in all 23,764 shares; of 110,017 shares of common stock owns 41,214 directly and 84,594 by reason of stock control of P. Lorillard Co., in all 75,808 shares.

American Cigar Company: Of 100,000 shares of preferred stock owns 89,700 shares directly and 5,000 shares through control of American Snuff Co., in all 94,700 shares; of 100,000 shares of common stock owns directly 77,451 shares.

American Stogie Company: Of 108,780 shares of common stock controls 78,072½ shares through stock interest in American Snuff Company. The American Stogie Company owns all of the stock—12,500—of the Union American Cigar Company—cigars and stogies.

MacAndrews & Forbes Company: Of 37,583 shares of preferred stock (no voting power) owns 7,500 shares; of 30,000 shares of common stock owns 21,129 shares directly and 983 shares through stock control of the R. J. Reynolds Co., in all 22,112 shares.

The Conley Foll Company: Of 8,250 shares of stock, directly owns 4,950 shares.

The American Tobacco Company: By stock ownership is the owner outright of the following defendant companies: S. Anargyros [The S. Anargyros Company owns all the capital stock (10 shares) of the London Cigarette Co.]; F. F. Adams Tobacco Co.; Blackwell's Durham Tobacco Co.; Crescent Cigar and Tobacco Co.; Day and Night Tobacco Co.; Luhrman & Wilbern Tobacco Co.; Nall & Williams Tobacco Co.; Nashville Tobacco Works; R. A. Patterson Tobacco Co.; Monopol Tobacco Works; Spaulding & Merrick.

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[145] The two foreign corporations were impleaded either because of their nature and character and the operation and effect of contracts or agreements with the American To-

The American Tobacco Co. also has the stock interest indicated in the following defendant corporations:

British-American Tobacco Co.: Owns 1,200,000 shares of 1,500,000 shares of preferred stock and 2,290,012 shares of 3,720,021 shares of common stock.

The Imperial Tobacco Co., etc.: Owns 721,457 pounds sterling of 18,000,000 pounds sterling of stock.

The John Bollman Co.: Of 2,000 shares of stock owns 1,020 shares.

F. R. Penn Tobacco Co.: Of 1,503 shares of stock owns 1,002 shares (through Blackwell's Durham Tobacco Co.).

R. P. Richardson, Jr., & Co., Inc.: Owns 600 out of 1,000 shares of stock and \$120,000 of \$200,000 issue of bonds.

R. J. Reynolds Tobacco Co.: Owns 50,000 out of 75,250 shares of stock.

Pinkerton Tobacco Co.: Owns 775 out of 1,000 shares of stock.

Reynolds Tobacco Co. (of Bristol, Tenn.): Owns 1,449 shares out of 2,500 shares.

J. W. Carroll Tobacco Co.: Owns 2,000 out of 3,000 shares.

P. Lorillard Co.: Owns 15,813 out of 20,000 shares of preferred and all the common stock (30,000 shares).

Kentucky Tobacco Product Co.: Owns 14 out of 1,900 shares preferred and owns directly 5,264, and, through the American Cigar Co., 355 out of 8,100 shares of common stock. [The Kentucky Tobacco Product Co. owns all the capital stock (100 shares) of the Kentucky Tobacco Extract Co.]

Porto Rican-American Tobacco Co.: Owns directly 6,578, and, through the American Cigar Co., 6,576 of 19,984 shares of stock. [The Porto Rican-American Tobacco Co. owns 190 of the 390 shares of preferred and 300 of the 450 shares of common stock of Ind. Co. of Porto Rico; also owns 2,150 of the 5,000 shares of capital stock of the Porto Rico Leaf Tobacco Co.]

The American Tobacco Company is also interested, as indicated, in the following defendants, supply or machinery companies:

Golden Belt Manufacturing Co. (cotton bags): Owns 6,521 of 7,000 shares.

Mengel Box Co. (wooden boxes): British-American Tobacco Co. owns 3,637 of 5,000 shares of stock.

[The Mengel Company owns all of the capital stock of the Columbia Box Company and of the Tyler Box Company, respectively 1,500 and 250 shares.]

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[146]bacco Company, or the power which it exerted over their affairs by stock ownership.

As we shall have occasion hereafter in referring to mat-

Amsterdam Supply Co. (agency to purchase supplies) : Owns majority of stock and controls large part of remainder through subsidiary companies.

Thomas Cusack Co. (bill posting) : Owns 1,000 out of 1,500 shares.

Manhattan Briar Pipe Co. : Owns all of stock, 3,500 shares.

International Cigar Machinery Co. : Of 100,000 shares owns 38,837 shares directly and 29,902 shares through Am. Cigar Co.; in all 68,539 shares.

The American Tobacco Company is also interested in the following companies, not named as defendants:

American Machine & Foundry Co. : Owns 510 shares directly and remainder (490) through Am. Cigar Co.

New Jersey Machine Co. : Owns 510 shares directly and remainder (490) through Am. Cigar Co.

Standard Tobacco Stemmer Co. : Of 17,300 shares owns 16,895 shares.

Garson Vending Machine Co. : Of 500 shares owns 250 shares.

The American Snuff Company in addition to stock, etc., interests in the American Tobacco Co., American Cigar Company, and the Amsterdam Supply Company, has stock interests in the following defendants:

H. Bolander : Owns all of stock, 1,350 shares;

De Voe Snuff Co. : Owns all of stock, 500 shares. [The De Voe Snuff Co. owns all the capital stock, 400 shares of Skinner & Co., snuff.]

Standard Snuff Co. : Owns all of stock, 2,816 shares.

The American Cigar Co. in addition to stock interests in the Amsterdam Supply Co., American Stogie Co., Porto Rican-American Tobacco Co., Kentucky Tobacco Product Co. and International Cigar Machinery Co., has the stock interest indicated in the following defendants:

R. D. Burnett Cigar Co. : Owns 77 out of 150 shares;

M. Blaskower Co. : Owns 1,875 out of 2,500 shares pref. and 1,875 out of 2,500 shares of common.

Cuban Land & Leaf Tobacco Co. : Owns all of stock, 1,000 shares.

[The Cuban Land, &c., Co. owns 1,820 of the 1,890 shares of stock of the Vuelta Abajo S. S. Co.]

Cliff Well Cigar Co. : Owns 255 out of 500 shares.

Dusel, Goodloe & Co. : Owns 510 out 750 shares.

Federal Cigar Real Estate Co. : Owns all stock, 6,000 shares.

J. J. Goodrum Tobacco Co. : Owns 477 out of 600 shares.

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[147]ters beyond dispute to set forth the main facts relied upon by the United States as giving rise to the cause of action alleged against all of the defendants it suffices at this

Havana-American Co.: Owns all stock, 2,500 shares.

Havana Tobacco Co.: Owns 700 shares out of 47,038 preferred, 166,800 out of 297,912 common stock, and \$3,500,000 of \$7,500,000 bonds.

Jordan Gibson & Baum Co., Inc.: Owns all preferred and common stock, 250 shares each.

Louisiana Tobacco Co., Limited: Owns 375 out of 500 shares.

The J. B. Moos Company: Owns all of stock, 2,000 shares.

J. & B. Moos: Owns all of common stock, 1,000 shares.

Porto Rican Leaf Tobacco Co.: Owns 2,500 out of 5,000 shares.

The Smokers' Paradise Corporation: Owns all of common stock (250 shares) and 349 of 500 shares preferred.

Havana Tobacco Co. has a stock interest in the following corporations:

He de Cabanis y Carbajal: All of stock, 15,000 shares.

Hy. Clay and Bock & Co., Lim.: Owns 3,749 out of 16,950 shares preferred and 14,687 out of 15,990 shares common.

[The Hy. Clay, &c., Co. is owner of 16,687 shares of the ordinary capital stock of the Havana Cigar & Tobacco Factories, Limited; and also owns 64 shares of the 1,390 shares of the capital stock of the Vuelta Abajo S. S. Co.]

Cuban Tobacco Co.: Owns all of stock, 50 shares.

Havana Commercial Co.: Owns 55,562 out of 60,000 shares preferred and 124,718 out of 125,000 shares common.

[The Havana Commercial Co. owns all of the capital stock—100 shares—of the M. Valle y Co.—cigars.]

Havana Cigar & Tobacco Factories, Lim.: Owns 6,774 out of 25,600 shares ordinary stock.

J. S. Muriel y Co.: Owns all of stock—7,500 shares.

Blackwell's Durham Tobacco Co.: In addition to a stock interest in the Amsterdam Supply Co., has the stock interest, indicated, in the following defendant corporations:

F. P. Penn Tobacco Co.: Owns 1,002 out of 1,503 shares.

Scotten-Dillon Co.: Owns \$16,000 out of \$500,000 of stock.

Wells-Whitehead Tobacco Co.: Owns all of stock, 1,500 shares.

Conley Foil Company: Owns all of the capital stock (8,000 shares) of the Johnson Tin Foil and Metal Co.

P. Lorillard Company: Has a stock interest in the American Snuff Company and the Amsterdam Supply Co.

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[148] moment to say that the bill averred the origin and nature of the American Tobacco Company and the origin and nature of all the other defendant corporations, whether accessory or subsidiary, and the connection of the individual defendants with such corporations. In effect the bill charged that the individual defendants and the defendant corporations were engaged in a conspiracy in restraint of interstate and foreign trade in tobacco and the products of tobacco and constituted a combination in restraint of such trade in violation of the first section of the act, and also were attempting to monopolize and were actually a monopolization of such trade in violation of the second section. In support of these charges general averments were made in the bill as to the wrongful purpose and intent with which acts were committed which it was alleged brought about the alleged wrongful result.

The prayer of the bill was as follows:

"Wherefore petitioner prays:

[149] "1. That the contracts, combinations, and conspiracies in restraint of trade and commerce among the States and with foreign nations, together with the attempts to monopolize and the monopolies of the same hereinbefore described be declared illegal and in violation of the act of Congress passed July 2, 1890, and subsequent acts, and that they be prevented and restrained by proper orders of the court.

"2. That the agreements, contracts, combinations, and conspiracies entered into by the defendants on or about September 27, 1902, and thereafter, and evidenced among other things by the two written agreements of that date, Exhibits 1 and 2 hereto, be declared illegal, and that injunctions issue restraining and prohibiting defendants from doing anything in pursuance of or in furtherance of the same within the jurisdiction of the United States.

"3. That the Imperial Tobacco Company, its officers, agents, and servants be enjoined from engaging in interstate or foreign trade

R. J. Reynolds Tobacco Co.: In addition to a stock interest in the Amsterdam Supply Company and the MacAndrews & Forbes Company, owns two-thirds of the 5,000 shares of stock of the Lilpfer Scales Co.

The British-American Tobacco Co.: In addition to a small interest in the Amsterdam Supply Company, has the following stock interest in certain defendants:

David Dunlop (plug): Owns 3,000 of 4,500 shares.

W. S. Mathews & Sons (smoking): Owns 2,637 out of 5,000 shares of stock.

T. C. Williams Company (plug): Owns all of stock, 4,000 shares.

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and commerce within the jurisdiction of the United States until it shall cease to observe or act in pursuance of said agreements, contracts, combinations, and conspiracies entered into by it and other defendants on or about September 27, 1902, and thereafter, and evidenced among other things by the contracts of that date, Exhibits 1 and 2 hereto.

"4. That the British-American Tobacco Company be adjudged an unlawful instrumentality created solely for carrying into effect the objects and purposes of said contract, combination, and conspiracy entered into on or about September 27, 1902, and thereafter, and that it be enjoined from engaging in interstate or foreign trade and commerce within the jurisdiction of the United States.

"5. That the court adjudge the American Tobacco Company, the American Snuff Company, the American Cigar Company, the American Stogie Company, the MacAndrews & Forbes Company, and the Conley Foil Company is each a combination in restraint of interstate and [150] foreign trade and commerce; and that each has attempted and is attempting to monopolize, is in combination and conspiracy with other persons and corporations to monopolize, and has monopolized part of the trade and commerce among the several States and with foreign nations; and order and decree that each one of them be restrained from engaging in interstate or foreign commerce, or, if the court should be of opinion that the public interests will be better subserved thereby, that receivers be appointed to take possession of all the property, assets, business, and affairs of said defendants and wind up the same, and otherwise take such course in regard thereto as will bring about conditions in trade and commerce among the States and with foreign nations in harmony with law.

"6. That the holding of stock by one of the defendant corporations in another under the circumstances shown be declared illegal, and that each of them be enjoined from continuing to hold or own such shares in another and from exercising any right in connection therewith.

"7. That defendants, each and all, be enjoined from continuing to carry out the purposes of the above-described contracts, combinations, conspiracies, and attempts to monopolize by the means herein described, or by any other, and be required to desist and withdraw from all connection with the same.

"8. That each of the defendants be enjoined from purchasing leaf tobacco or from selling and distributing its manufactured output as a part of interstate and foreign trade and commerce in conjunction or combination with any other defendant, and from taking part or being interested in any agreement of combination intended to destroy competition among them in reference to such purchases or sales.

"9. That petitioners have such other, further, and general relief as may be proper."

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As to the answers, it suffices to say that all the individual [151] and corporate defendants other than the foreign corporations denied the charges of wrong-doing and illegal combination and the corporate defendants in particular in addition averred their right under state charters by virtue of which they existed to own and possess the property which they held and further averred that they were engaged in manufacturing and that any combination amongst them related only to that subject, and therefore was not within the Anti-Trust Act. The two foreign corporations asserted the validity of their corporate organization and of the assailed agreements, and denied any participation in the alleged wrongful combination.

After the taking of much testimony before a special examiner, the case was heard before a court consisting of four judges, constituted under the expediting act of February 11, 1908. In deciding the case in favor of the Government each of the four judges delivered an opinion (164 Fed. Rep. 700). A final decree was entered on December 15, 1908. The petition was dismissed as to the English corporations, three of the subsidiary corporations, the United Cigar Stores Company and all the individual defendants. It was decreed that the defendants other than those against whom the petition was dismissed, had theretofore entered into and were parties to combinations in restraint of trade, etc., in violation of the Anti-Trust Act and said defendants and each of them, their officers, agents, etc., were restrained and enjoined "from directly or indirectly doing any act or thing whatsoever in furtherance of the objects and purposes of said combinations and from continuing as parties thereto." It specifically found that each of the defendants, "The American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, and MacAndrews & Forbes Company constitutes and is itself a combination in violation of the said act of Congress." The corporations thus named, their officers, etc., were next restrained [152] and enjoined "from further directly or indirectly engaging in interstate or foreign trade and commerce in leaf tobacco or the products manufactured therefrom or articles necessary or useful

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in connection therewith. But if any of said last-named defendants can hereafter affirmatively show the restoration of reasonably competitive conditions, such defendant may apply to this court for a modification, suspension or dissolution of the injunction herein granted against it." The decree then enumerated the various corporations which it was found held or claimed to own some or all of the capital stock of other corporations and particularly specified such other corporations, and then made the following restraining provisions:

"Wherefore each and all of defendants, The American Tobacco Company, the American Snuff Company, the American Cigar Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, Blackwell's Durham Tobacco Company and Conley Foll Company, their officers, directors, agents, servants and employees are hereby restrained and enjoined from acquiring by conveyance or otherwise, the plant or business of any such corporation wherein any one of them now holds or owns stock; and each and all of said defendant corporations so holding stock in other corporations as above specified, their officers, directors, agents, servants and employees, are further enjoined from voting or attempting to vote said stock at any meeting of the stockholders of the corporation issuing the same and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of such corporation. And it is further ordered and decreed that each and every of the defendant corporations the stock of which is held by any other defendant corporation as hereinbefore shown, their officers, directors, servants and agents, be and they are hereby respectively and collectively restrained and enjoined from permitting the stock so held to be voted by any other de[155]fendant holding or claiming to own the same or by its attorneys or agents at any corporate election for directors or officers and from permitting or suffering any other defendant corporation claiming to own or hold stock therein, or its officers or agents, to exercise any control whatsoever over its corporate acts."

Judgment for costs was given in favor of the petitioner and against the defendants as to whom the petition had not been dismissed, except the R. P. Richardson, Jr., & Company, a corporation which had consented to the decree. The decree also contained a provision that the defendants or any of them should not be prevented "from the institution, prosecution or defense of any suit, action or proceeding to prevent or restrain the infringement of a trade-mark used in interstate commerce or otherwise assert or defend a claim to

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any property or rights." In the event of a taking of an appeal to this court, the decree provided that the injunction which it directed "shall be suspended during the pendency of such appeal."

The United States appealed, as did also the various defendants against whom the decree was entered. For the Government it is contended:

1. That the petition should not have been dismissed as to the individual defendants.

2. That it should not have been dismissed as to the two foreign corporations—the Imperial Tobacco Company and the British-American Tobacco Company and the domestic corporations controlled by the latter, and that, on the contrary, the decree should have commanded the observance of the Anti-Trust Act by the foreign corporations so far as their dealings in the United States were concerned, and should have restrained those companies from doing any act in the United States in violation of the Anti-Trust Act, whether or not the right to do said acts was asserted to have arisen pursuant to the contracts made outside of or within the United States.

3. The petition should not have been dismissed as to the United Cigar Stores [154] Company.

4. The final decree should have adjudged defendants parties to unlawful contracts and conspiracies.

5. The final decree should have adjudged that defendants were attempting to monopolize and had monopolized parts of commerce. More particularly, it is urged, it should have adjudged that the American Tobacco Company, American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company, the Conley Foil Company and the British-American Tobacco Company were severally attempting to monopolize and had monopolized parts of commerce and that appropriate remedies should have been applied.

6. The decree was not sufficiently specific, since it should have described with more particularity the methods which the defendants had followed in forming and carrying out their unlawful purpose, and should have prohibited the resort to similar methods.

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7. The decree should have specified the shares in corporations disclosed by the evidence to be owned by the parties to the conspiracy, and should have enjoined those parties from exercising any control over the corporations in which such stock was held, and the latter, if made defendant, from permitting such control, and should have also enjoined the collecting of any dividends upon the stock.

8. The decree improperly provided that nothing therein should prevent defendants from prosecuting or defending suits; also improperly suspending the injunction pending appeal.

The defendants, by their assignments of error, complain because the petition was not dismissed as to all, and more specifically, (a) because they were adjudged parties to a combination in restraint of interstate and foreign commerce, and enjoined accordingly; (b) because certain defendant corporations holding shares in others were enjoined from voting them or exercising control over the issuing company, and the latter from permitting this; and (c) because the American Tobacco Company, American [155] Snuff Company, American Cigar Company, American Stogie Company and the MacAndrews & Forbes Company were adjudged unlawful combinations and restrained from engaging in interstate and foreign commerce.

The elaborate arguments made by both sides at bar present in many forms of statement the conflicting contentions resulting from the nature and character of the suit and the defense thereto, the decree of the lower court and the propositions assigned as error to which we have just referred. In so far as all or any of these contentions, as many of them in fact do, involve a conflict as to the application and effect of §§ 1 and 2 of the Anti-Trust Act, their consideration has been greatly simplified by the analysis and review of that act and the construction affixed to the sections in question in the case of *Standard Oil Company v. United States*, quite recently decided, *ante*, p. 1. In so far as the contentions relate to the disputed propositions of fact, we think from the view which we take of the case they need not be referred to, since in our opinion the case can be disposed of

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by considering only those facts which are indisputable and by applying to the inferences properly deducible from such facts the meaning and effect of the law as expounded in accordance with the previous decisions of this court.

We shall divide our investigation of the case into three subjects: First, the undisputed facts; second, the meaning of the Anti-Trust Act and its application as correctly construed to the ultimate conclusions of fact deducible from the proof; third, the remedies to be applied.

First. Undisputed facts:

The matters to be considered under this heading we think can best be made clear by stating the merest outline of the condition of the tobacco industry prior to what is asserted to have been the initial movement in the combination which the suit assails and in the light so afforded to briefly recite the history of the assailed acts and con[156]tracts. We shall divide the subject into two periods, (a) the one from the time of the organization of the first or old American Tobacco Company in 1890 to the organization of the Continental Tobacco Company, and (b) from the date of such organization to the filing of the bill in this case.

Summarizing in the broadest way the conditions which obtained prior to 1890, as to the production, manufacture and distribution of tobacco, the following general facts are adequate to portray the situation.

Tobacco was grown in many sections of the country having diversity of soil and climate and therefore was subject to various vicissitudes resulting from the places of production and consequently varied in quality. The great diversity of use to which tobacco was applied in manufacturing caused it to be that there was a demand for all the various qualities. The demand for all qualities was not local, but widespread, extending as well to domestic as to foreign trade, and, therefore, all the products were marketed under competitive conditions of a peculiarly advantageous nature. The manufacture of the product in this country in various forms was successfully carried on by many individuals or concerns scattered throughout the country, a larger number perhaps of the manufacturers being in the vicinage of production

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and others being advantageously situated in or near the principal markets of distribution.

Before January, 1890, five distinct concerns—Allen & Ginter, with factory at Richmond, Va.; W. Duke, Sons & Co., with factories at Durham, North Carolina, and New York City; Kinney Tobacco Company, with factory at New York City; W. S. Kimball & Company, with factory at Rochester, New York; Goodwin & Company, with factory at Brooklyn, New York—manufactured, distributed and sold in the United States and abroad 95 per cent of all the domestic cigarette and less than 8 per cent [157] of the smoking tobacco produced in the United States. There is no doubt that these factories were competitors in the purchase of the raw product which they manufactured and in the distribution and sale of the manufactured products. Indeed it is shown that prior to 1890 not only had normal and ordinary competition existed between the factories in question, but that the competition had been fierce and abnormal. In January, 1890, having agreed upon a capital stock of \$25,000,000, all to be divided amongst them, and who should be directors, the concerns referred to organized the American Tobacco Company in New Jersey, "for trading and manufacturing," with broad powers, and conveyed to it the assets and businesses, including good will and right to use the names of the old concerns; and thereafter this corporation carried on the business of all. The \$25,000,000 of stock of the Tobacco Company was allotted to the charter members as follows: Allen & Ginter, \$3,000,000 preferred, \$4,500,000 common; W. Duke, Sons & Co., \$3,000,000 preferred, \$4,500,000 common; Kinney Tobacco Company, \$2,000,000 preferred, \$3,000,000 common; W. S. Kimball & Co., \$1,000,000 preferred, \$1,500,000 common; and Goodwin & Co., \$1,000,000 preferred, \$1,500,000 common.

There is a charge that the valuation at which the respective properties were capitalized in the new corporation was enormously in excess of their actual value. We, however, put that subject aside, since we propose only to deal with facts which are not in controversy.

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Shortly after the formation of the new corporation the Goodwin & Co. factory was closed, and the directors ordered "that the manufacture of all tobacco cigarettes be concentrated at Richmond." The new corporation in 1890, the first year of its operation, manufactured about two and one half billion cigarettes, that is, about 96 or 97 per cent of the total domestic output, and about five and one-half million pounds of smoking tobacco out [158] of a total domestic product of nearly seventy million pounds.

In a little over a year after the organization of the company it increased its capital stock by ten million dollars. The purpose of this increase is inferable from the considerations which we now state.

There was a firm known as Pfingst, Doerhoefer & Co., consisting of a number of partners, who had been long and successfully carrying on the business of manufacturing plug tobacco in Louisville, Kentucky, and distributing it through the channels of interstate commerce. In January, 1891, this firm was converted into a corporation known as the National Tobacco Works, having a capital stock of \$400,000 all of which was issued to the partners. Almost immediately thereafter, in the month of February, the American Tobacco Company became the purchaser of all the capital stock of the new corporation, paying \$600,000 cash and \$1,200,000 in stock of the American Tobacco Company. The members of the previously existing firm bound themselves by contract with the American Tobacco Company to enter its service and manage the business and property sold, and each further agreed that for ten years he would not engage in carrying on, directly or indirectly, or permit or suffer the use of his name in connection with the carrying on of the tobacco business in any form.

In April following, the American Tobacco Company bought out the business of Philip Whitlock, of Richmond, Virginia, who was engaged in the manufacture of cheroots and cigars, and with the exclusive right to use the name of Whitlock. The consideration for this purchase was \$300,000, and Whitlock agreed to become an employee of the American Tobacco Company for a number of years and not to engage for twenty years in the tobacco business.

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In the month of April the American Tobacco Company also acquired the business of Marburg Brothers, a well-known firm located at Baltimore, Maryland, and engaged [159] in the manufacture and distribution of tobacco, principally smoking and snuff. The consideration was a cash payment of \$164,637.65 and stock to the amount of \$3,075,000. The members of the firm also conveyed the right to the use of the firm name and agreed not to engage in the tobacco business for a lengthy period.

Again, in the same month, the American Tobacco Company bought out a tobacco firm of old standing, also located in Baltimore, known as G. W. Gail & Ax, engaged principally in manufacturing and selling smoking tobacco, buying with the business the exclusive right to use the name of the firm or the partners, and the members of the firm agreed not to engage in the tobacco business for a specified period. The consideration for this purchase was \$77,582.66 in cash and stock to the amount of \$1,760,000. The plant was abandoned soon after.

The result of these purchases was manifested at once in the product of the company for the year 1891, as will appear from a note in the margin.* It will be seen that as to cheroots, smoking tobacco, fine cut tobacco, snuff and plug tobacco, the company had become a factor in all branches of the tobacco industry.

* The output of the American Tobacco Company for 1891.

	Number.	Pounds.
Cigarettes -----	2, 788, 778, 000	-----
Cheroots and little cigars -----	40, 009, 000	-----
Smoking -----	-----	18, 813, 355
Fine cut -----	-----	560, 633
Snuff -----	-----	383, 162
Plug -----	-----	4, 442, 774

Total output for the United States, 1891.

Cigarettes -----	8, 137, 318, 596	-----
Smoking -----	-----	78, 708, 306
Fine cut -----	-----	16, 938, 870
Plug and twist -----	-----	186, 177, 915
Snuff -----	-----	10, 674, 241

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Referring to the occurrences of the year 1891, as in all [160] respects typical of the occurrences which took place in all the other years of the first period, that is during the years 1892, 1893, 1894, 1895, 1896, 1897, and 1898, we content ourselves with saying that it is undisputed that between February, 1891, and October, 1898, including the purchases which we have specifically referred to, the American Tobacco Company acquired fifteen going tobacco concerns doing business in the States of Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, and Virginia. For ten of the plants an all cash consideration of \$6,410,235.26 was paid, while the payments for the remaining five aggregated in cash \$1,115,100.95 and in stock \$4,123,000. It is worth noting that the last purchase, in October, 1898, was of the Drummond Tobacco Company, a Missouri corporation dealing principally in plug, for which a cash consideration was paid of \$3,457,500.

The corporations which were combined for the purpose of forming the American Tobacco Company produced a very small portion of plug tobacco. That an increase in this direction was contemplated is manifested by the almost immediate increase of the stock and its use for the purpose of acquiring, as we have indicated, in 1891 and 1892, the ownership and control of concerns manufacturing plug tobacco and the consequent increase in that branch of production. There is no dispute that as early as 1893 the president of the American Tobacco Company, by authority of the corporation, approached leading manufacturers of plug tobacco and sought to bring about a combination of the plug tobacco interests, and upon the failure to accomplish this, ruinous competition, by lowering the price of plug below its cost, ensued. As a result of this warfare, which continued until 1898, the American Tobacco Company sustained severe losses aggregating more than four millions of dollars. The warfare produced its natural result, not only because the company acquired [161] during the last two years of the campaign, as we have stated, control of important plug tobacco concerns, but others engaged in that industry came to terms. We say this because in 1898, in connection with several leading plug manu-

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facturers, the American Tobacco Company organized a New Jersey corporation styled the Continental Tobacco Company, for "trading and manufacturing," with a capital of \$75,000,000, afterwards increased to \$100,000,000. The new company issued its stock and took transfers to the plants, assets and businesses of five large and successful competing plug manufacturers.*

The American Tobacco Company also conveyed to this corporation, at large valuations, the assets, brands, real estate and good will pertaining to its plug tobacco business, including the National Tobacco Works, the James G. Butler Tobacco Co., Drummond Tobacco Company, and Brown Tobacco Co., receiving as consideration \$30,274,200 of stock (one-half common and one-half preferred), \$300,000 cash, and an additional sum for losses sustained in the plug business during 1898, \$840,035. Mr. Duke, the president of the American Tobacco Company, also became president of the Continental Company.

Under the preliminary agreement which was made looking to the formation of the Continental Tobacco [162] Company, that company acquired from the holders all the \$3,000,000 of the common stock of the P. Lorillard Company in exchange for \$6,000,000 of its stock, and \$1,581,300 of the \$2,000,000 preferred in exchange for notes aggregating a sum considerably larger. The Lorillard Company, however, although it thus passed practically under the control of the American Tobacco Company by virtue of its ownership of stock in the Continental Company, was not liquidated, but its business continued to be conducted as a distinct corpora-

* P. J. Sorg Co., having factory at Middletown, Ohio, who received preferred stock \$4,350,000, common stock \$4,525,000, and cash \$224,375.

John Finzer and Brothers, having factory at Louisville, Ky., who received preferred stock \$2,250,000, common stock \$3,050,000, and cash \$550,000.

Daniel Scotten & Co., having factory at Detroit, Mich., who received preferred stock \$1,911,100, and common stock \$3,012,500.

P. H. Mayo & Bros., having factory at Richmond, Va., who received preferred stock \$1,250,000, common stock \$1,925,000, and cash \$66,125.

John Wright Co., having factory at Richmond, Va., who received preferred stock \$495,000, common stock \$495,000, and cash \$4,116.67.

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tion, its goods being marked and put upon the market just as if they were the manufacture of an independent concern.

Following the organization of the Continental Tobacco Company the American Tobacco Company increased its capital stock from thirty-five millions of dollars to seventy millions of dollars, and declared a stock dividend of one hundred per cent on its common stock, that is, a stock dividend of \$21,000,000.

As the facts just stated bring us to the end of the first period which at the outset we stated it was our purpose to review, it is well briefly to point out the increase in the power and control of the American Tobacco Company and the extension of its activities to all forms of tobacco products which had been accomplished just prior to the organization of the Continental Tobacco Company. Nothing could show it more clearly than the following: At the end of the time the company was manufacturing 86 per cent or thereabouts of all the cigarettes produced in the United States, above 26 per cent of all the smoking tobacco, more than 22 per cent of all plug tobacco, 51 per cent of all little cigars, 6 per cent each of all snuff and fine cut tobacco, and over 2 per cent of all cigars and cheroots.

A brief reference to the occurrences of the second period, that is, from and after the organization of the Continental Tobacco Company up to the time of the bringing of this [163] suit, will serve to make evident that the transactions in their essence had all the characteristics of the occurrences of the first period.

In the year 1899 and thereafter either the American or the Continental company, for cash or stock, at an aggregate cost of fifty millions of dollars (\$50,000,000), bought and closed up some thirty competing corporations and partnerships theretofore engaged in interstate and foreign commerce as manufacturers, sellers, and distributors of tobacco and related commodities, the interested parties covenanting not to engage in the business. Likewise the two corporations acquired for cash, by issuing stock, and otherwise, control of many competing corporations, now going concerns, with plants in various States, Cuba and Porto Rico, which manufactured,

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bought, sold and distributed tobacco products or related articles throughout the United States and foreign countries, and took from the parties in interest covenants not to engage in the tobacco business.

The plants thus acquired were operated until the merger in 1904, to which we shall hereafter refer, as a part of the general system of the American and Continental companies. The power resulting from and the purpose contemplated in making these acquisitions by the companies just referred to, however, may not be measured by considering alone the business of the company directly acquired, since some of these companies were made the vehicles as representing the American or Continental company for acquiring and holding the stock of other and competing companies, thus amplifying the power resulting from the acquisitions directly made by the American or Continental company, without ostensibly doing so. It is besides undisputed that in many instances the acquired corporations with the subsidiary companies over which they had control through stock ownership were carried on ostensibly as independent concerns disconnected [164] from either the American or the Continental company, although they were controlled and owned by one or the other of these companies. Without going into details on these subjects, for the sake of brevity, we append in the margin a statement of the corporations thus acquired, with the mention of the competing concerns which such corporations acquired.*

* Monopol Tobacco Works (New York, N. Y.): Capital, \$40,000; cigarettes and smoking tobacco. In 1899 the American Tobacco Co. acquired all the shares for \$250,000, and it is now a selling agency.

Luhrman & Wilbern Tobacco Company (Middletown, Ohio): Capital, \$900,000; scrap tobacco. This business was formerly carried on by a partnership.

Mengel Box Company (Louisville, Ky.): Capital, \$2,000,000; boxes for packing tobacco. This company has acquired the stock (\$150,000) of Columbia Box Company and of Tyler Box Company (\$25,000), both at St. Louis.

The Porto Rican-American Tobacco Company (Porto Rico): Capital, \$1,799,600. In 1899 the American Company caused the organization of the Porto Rican-American Tobacco Company, which took over the partnership business of Rucabado y Portela—manufacturer of

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[165] It is of the utmost importance to observe that the acquisitions made by the subsidiary corporations in some cases likewise show the remarkable facts stated above, that is, the disbursement of enormous amounts of money to [166] ac-

cigars and cigarettes—with covenants not to compete. The American Tobacco Company and American Cigar Company each hold \$565,300 of the stock; the balance is in the hands of individuals.

Kentucky Tobacco Product Company (Louisville, Ky.): Capital, \$1,000,000. In 1899 the Continental Company acquired control of the Louisville Spirit-Cured Tobacco Co., engaged in curing and treating tobacco and utilizing the stems for fertilizers. By agreement, the Kentucky Tobacco Product Company was organized in New Jersey, with \$1,000,000 capital, \$450,000 issued to the old stockholders, and \$550,000 to Continental Company as consideration for agreement to supply stems.

Golden Belt Manufacturing Company (North Carolina): Capital, \$700,000; cotton bags and containers. In 1899 the American Tobacco Company acquired the business of this corporation, which was formed to take over a going business.

The Conley Foll Company (New York): Tinfoil combination; capital, \$825,000. In December, 1899, The American Tobacco Company secured control of the business of John Conley & Son (partnership), New York, N. Y., manufacturers of tinfoil, an essential for packing tobacco products. By agreement the Conley Foll Company was incorporated in New Jersey "for trading and manufacturing," etc., with \$250,000 capital (afterwards \$375,000 and \$825,000)—which took over the firm's business and assets, etc., and The American Tobacco Company became owner of the majority shares. The Conley Foll Company has acquired all the stock of the Johnson Tinfoil & Metal Company—a defendant—of St. Louis, a leading competitor, and they supply under fixed contracts, the tinfoil used by defendants.

R. J. Reynolds Tobacco Company (Winston-Salem, North Carolina). In 1899 the Continental Tobacco Company acquired control of the R. J. Reynolds Tobacco Company, one of the largest manufacturers of plug—output in 1898, 6,000,000 pounds. By agreement, a new corporation (with same name) was organized in New Jersey and capitalized at \$5,000,000 (afterwards \$7,525,000), which took over the business and assets of the old one. The Continental Company immediately acquired the majority shares and The American Company now holds \$5,000,000 of stock. The separate organization has been preserved.

There was acquired in the name of the new Reynolds Company, with covenants against competition, the following plants:

In 1900, T. L. Vaughn & Company, partnership, of Winston, N. C.; consideration, \$90,506; Brown Brothers Company, a North Carolina

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quire plants, which on being purchased were not utilized but were immediately closed. It is also to be remarked, that the facts stated in the memorandum in the margin show on their face a singular identity between the conceptions which governed the transactions of this latter period with those

corporation, Winston, N. C.; consideration, \$67,615; and P. H. Hanes & Company and B. F. Hanes & Company, Winston, N. C., partnership; consideration, \$671,950.

In 1906, Rucker & Witten Tobacco Company, Martinsville, Va.; consideration, \$512,898.

In 1906, D. H. Spencer & Company, Martinsville, Va.; consideration, \$314,255.

(All of the foregoing plants were closed as soon as purchased.)

A majority of the \$400,000 capital stock in the Lilpfert-Scales Company, of Winston, N. C., a corporation largely engaged in the manufacture of plug tobacco and interstate and foreign commerce in leaf tobacco and its products, was acquired by the Reynolds Company. The separate organization of the Lilpfert-Scales Company is preserved and the business carried on under its corporate name.

The R. J. Reynolds Tobacco Company also holds \$98,300 of stock of the MacAndrews & Forbes Company and \$9,600 of the Amsterdam Supply Company.

Blackwell's Durham Tobacco Company (Durham, N. C.); Capital, \$1,000,000. In 1899 The American Tobacco Company procured for \$4,000,000 all the stock of Blackwell's Durham Tobacco Company at Durham, N. C., manufacturer and distributor of tobacco products. Thereupon the Blackwell's Durham Tobacco Company, of New Jersey, capital, \$1,000,000, all owned by the American, was organized and took over the assets of the old company, then under receivership. Its separate organization has been preserved.

The Durham Company has acquired control of the following competitors—Reynolds Tobacco Company; F. R. Penn Tobacco Company; and Wells-Whitehead Tobacco Company.

The following companies came also under the control of the American Tobacco Company through acquired stock ownership.

S. Anargyros: Capital, \$650,000; Turkish cigarettes. In 1890 The American Tobacco Company procured the organization of corporation of S. Anargyros, which took over that individual's going business and has since controlled it. Through this company the business in Turkish cigarettes is largely conducted.

The John Bollman Company (San Francisco): Capital, \$200,000; cigarettes. In 1900 The American Tobacco Company procured organization of The John Bollman Company, which took over the business of the former concern in exchange for stock. Its separate organization has been preserved.

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which evidently existed at the very birth of the original organization of the American Tobacco Company, as exemplified by the transactions in the first period. A statement of particular transactions outside of those previously referred to as having occurred during the period in question will serve additionally to make the situation clear. And to accomplish this purpose we shall, as briefly as may be consistent with clarity, separately refer to the facts concerning the organization during the [167] second period of the five corporations which were named as defendants in the bill, as heretofore stated and which for the purpose of designation we have hitherto classified as accessory defendants, such corporations being the American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews & Forbes Company (licorice), and Conley Foil Company.

(1). *The American Snuff Company:*

As we have seen, the American Tobacco Company at the commencement of the first period produced a very small quantity of snuff. Its capacity, however, in that regard was augmented owing particularly to the formation of the Continental Tobacco Company and the acquisition of the Lorillard Company, by which it came to be a serious factor as a snuff producer. There shortly ensued an aggressive competition in the snuff business between the American Tobacco Company, with the force acquired from the vantage ground resulting from the dominancy of its expanded organization, and others in the trade operating independently of that organization. The result was identical with that which had previously arisen from like conditions in the past.

In March, 1900, there was organized in New Jersey a corporation known as The American Snuff Company, with a capital of \$25,000,000, one-half preferred and one-half common, which took over the snuff business of the P. Lorillard Company, Continental Tobacco Company and The American Tobacco Company, with that of a large competitor, viz: The Atlantic Snuff Co. The stock of the new company was thus apportioned: Atlantic Snuff Company, preferred, \$7,500,000, common, \$25,000,000; P. Lorillard Company, preferred, \$1,124,700, common, \$3,459,400; The American Tobacco Com-

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pany, preferred, \$1,177,800, common, \$3,227,500; Continental Tobacco Company, preferred, \$197,500 common, \$813,100. The stock issued to Continental Tobacco Company and the [168] defendants, P. Lorillard Company and the American Tobacco Company, is still held by the latter, and they have at all times had a controlling interest in the Snuff Company. All the companies, together with their officers and directors, covenanted that they would not thereafter engage as competitors in the tobacco business or the manufacture, sale, or distribution of snuff.

Among the assets transferred by the Atlantic Snuff Company to American Snuff Company were all the shares (\$600,000) of W. E. Garrett & Sons, Inc., then and now one of the oldest and very largest producers of snuff, for a long time and still engaged at Yorkland, Del., in interstate and foreign commerce in tobacco and its products, and which controlled through stock ownership the Southern Snuff Company, Memphis, Tenn.; Dental Snuff Company, Lynchburg, Va., and Stewart-Ralph Snuff Company, Clarksville, Tenn. The separate existence of W. E. Garrett & Son, Inc., has been preserved and its business conducted under the corporate name. In March, 1900, the American Snuff Company acquired all the shares of George W. Helme Company, one of the oldest and largest producers of snuff and actively engaged at Helmetta, N. J., in interstate and foreign commerce in competition with defendants, by issuing in exchange therefor \$2,000,000 preferred stock and \$1,000,000 common; and it thereafter took a conveyance of all assets of the acquired company and now operates the plant under its own name.

As a result of the transactions just stated it came to pass that the American Tobacco Company, which had at the end of the first period only a very small percentage of the snuff manufacturing business, came virtually to have the dominant control as a manufacturer of that product.

2. Conley Foil Company—manufacturers of tin foil, an essential for packing tobacco products:

In December, 1899, the American Tobacco Company secured control of the business of John Conley & Sons, a [169] partnership of New York City. By agreement the

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Conley Foil Company was incorporated in New York "for trading and manufacturing," etc., with \$250,000 capital, ultimately increased to \$825,000. The corporation took over the business and assets of the firm, and the American Tobacco Company became owner of a majority of the shares of stock. The Conley Foil Company has acquired all the shares of stock of the Johnson Tinfoil & Metal Company, of St. Louis, a leading competitor, and they supply under fixed contracts at remunerative prices the tinfoil used by the defendants, which constitutes the major part of the total production in the United States.

3. American Cigar Company:

Prior to 1901 the American and Continental tobacco companies manufactured, sold, and distributed cigars, stogies, and cheroots. In the year stated the companies determined to engage in the business upon a larger scale. Under agreement with Powell, Smith & Company, large manufacturers and dealers in cigars, they caused the incorporation in New Jersey of the American Cigar Company "for trading and manufacturing," etc., to which all three conveyed their said business, and it has since carried on the same. The American and Continental companies each acquired 46½ per cent of the shares, and Powell, Smith & Company 7 per cent; the original capitalization was \$10,000,000 (afterwards \$20,000,000), and more than three-fourths is owned by the former. The Cigar Company acquired many competitors (partnerships and corporations) engaged in interstate and foreign commerce, taking from the parties covenants against engaging in the tobacco business; and it has also procured the organization of controlled corporations which have acquired competing manufacturers, jobbers, and distributors in the United States, Cuba, and Porto Rico. It manufactures, sells and distributes a considerable per centage of domestic cigars; is the dominating factor in the tobacco business, [170] foreign and domestic, in Cuba and Porto Rico, and is there engaged in tobacco planting. It also controls corporate jobbers in California, Alabama, Virginia, Pennsylvania, Georgia, Louisiana, New Jersey, and Tennessee.

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4. *The MacAndrews & Forbes Company—manufacturers of licorice:*

There is no question that licorice paste is an essential ingredient in the manufacture of plug tobacco, and that one who is debarred from obtaining such paste would therefore be unable to engage in or carry on the manufacture of such product. The control over this article was thus secured: In May, 1902, the Continental Company secured control of MacAndrews and Forbes Co. of Newark, New Jersey, and organized "for trading and manufacturing" a corporation known as the MacAndrews & Forbes Co., with a capital of \$7,000,000, \$4,000,000 preferred and \$3,000,000 common, which took over the business of MacAndrews and Forbes and another large competitor. The Continental Company acquired two-thirds of the common stock by agreeing to purchase its supply of paste from the new company. The American Tobacco Company, at the time of the filing the bill, was the owner of \$2,112,900 of the common stock and \$750,000 preferred. By various purchases and agreements the MacAndrews & Forbes Company acquired, substantially, the business of all competitors. Thus, in June, 1902, it purchased the business of the Stamford Mfg. Co., of Stamford, Connecticut, and incorporated the National Licorice Company, which acquired the business of Young & Smylie and F. B. & V. P. Scudder, and the National Company agreed with MacAndrews & Forbes not to produce licorice for tobacco manufacturers. In 1906 all the stock in the J. S. Young Company (\$1,800,000), which had been organized to take over the business of the J. S. Young Co. of Baltimore, Md., was acquired by the MacAndrews & Forbes Co. The MacAndrews & Forbes Co. use in excess [171] of 95 per cent of the licorice root consumed in the United States.

5. *American Stogie Company:*

In May, 1903, the American Cigar Company and the American and Continental Tobacco Companies caused the American Stogie Company to be incorporated in New Jersey, with \$11,979,000 capital, which immediately took over the stogie and tobie business of the companies named in exchange for \$3,206,275 stock and then in the usual ways ac-

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quired the business of others in the manufacture, sale, and distribution of such products, with covenants not to compete. It acquired in exchange for \$3,647,725 stock all shares of United States Cigar Company (which had previously acquired and owned the business of important competitors) and subsequently took the conveyance of the plant and assets. The majority shares always have been held by defendant, the American Cigar Company.

As we think the legitimate inferences deducible from the undisputed facts which we have thus stated will be sufficient to dispose of the controversy, we do not deem it necessary to expand this statement so as to cause it to embrace a recital of the undisputed facts concerning the entry of the American Tobacco Company into the retail tobacco trade through the acquisition of a controlling interest in the stock of what is known as the United Cigar Stores Company, as well as to some other subjects which for the sake of brevity we likewise pass over, in order to come at once to a statement concerning the foreign companies.

The English companies:

In September, 1901, the American Tobacco Co. purchased for \$5,347,000 a Liverpool (Eng.) corporation, known as Ogden's Limited, there engaged in manufacturing and distributing tobacco products. A trade conflict which at once ensued caused many of the English manufacturers to combine into an incorporation known as the [172] Imperial Tobacco Company of Great Britain and Ireland, capital 15,000,000, afterwards increased to 18,000,000, pounds sterling. The trade war was continued between this corporation and the American Tobacco Company, with a result substantially identical with that which had hitherto, as we have seen, arisen from such a situation.

In September, 1902, the Imperial and the American companies entered into contracts (executed in England) stipulating that the former should limit its business to the United Kingdom, except purchasing leaf in the United States (it buys 54,000,000 pounds annually); that the American companies should limit their business to the United States, its dependencies and Cuba; and that the British-American To-

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bacco Company, with capital of 6,000,000 pounds sterling apportioned between them, should be organized, take over the export business of both, and operate in other countries, etc. This arrangement was immediately put into effect and has been observed.

The Imperial Company holds one-third and the American Company two-thirds of the capital stock of the British-American Tobacco Company, Limited. The latter company maintains a branch office in New York City and the vice-president of the American Tobacco Company is a principal officer. This company uses large quantities of domestic leaf, partly exported to various plants abroad and about half manufactured here and then exported. By agreement, all this is purchased through the American Tobacco Company. In addition to many plants abroad it has warehouses in various States and plants at Petersburg, Va., and Durham, N. C., where tobacco is manufactured and then exported.

The purchase of necessary leaf tobacco in the United States by the Imperial Company is now made through a resident general agent and is exported as a part of foreign commerce.

Not to break the continuity of the narrative of facts we [173] have omitted in the proper chronological order to state the facts relative to what was known as the Consolidated Tobacco Company. We now particularly refer to that subject.

The Consolidated Tobacco Co.:

In June, 1901, parties largely interested in the American and Continental companies caused the incorporation in New Jersey of the Consolidated Tobacco Company, capital \$30,000,000 (afterwards \$40,000,000), with broad powers and perpetual existence; to do business throughout the world, and to guarantee securities of other companies, etc. A majority of shares was taken by a few individuals connected with the old concerns: A. N. Brady, J. B. Duke, A. H. Payne, Thomas Ryan, W. C. Whitney, and P. A. B. Widener. J. B. Duke, president of both the old companies, became president of the Consolidated. Largely in exchange for bonds the new company acquired substantially all the shares of common stock of the old ones. Its business, of holding

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and financing, was continued until 1904, when, with the American and Continental Companies, it was merged into the present American Tobacco Company.

By proceedings in New Jersey, October, 1904, the (old) American Tobacco Company, Continental Tobacco Company, and Consolidated Tobacco Company were merged into one corporation, under the name of The American Tobacco Company, the principal defendant here. The merged company, with perpetual existence, was capitalized at \$180,000,000 (\$80,000,000 preferred, ordinarily without power to vote).

The powers conferred by the charter are stated in the margin.*

[174] Prior to the merger the Consolidated Tobacco Company, a majority of whose \$40,000,000 share capital was held by J. B. Duke, Thomas F. Ryan, William C. Whitney, Anthony N. Brady, Peter A. B. Widener and Oliver H. Payne, had acquired, as already stated, nearly all common shares of both old American and Continental companies, and thereby control. The preferred shares, however, were held by many individuals. Through the method of distribution of the stock of the new company, in exchange for shares in the old American and in the Continental Company, it resulted that the same six men in control of the combination through the Consolidated Tobacco Company continued that control by ownership of stock in the merged or new American Tobacco Company. The assets, property, etc., of the old

*To buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; * * * to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder; * * * to carry on any business operations deemed by such merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; * * * to conduct business in all other States, territories, possessions and dependencies of the United States of America, and in all foreign countries; * * * to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock or of any bonds, securities, or other evidence of indebtedness created by any other corporation or corporations of this or any other State or government, and to issue its own obligations in payment or exchange therefor. * * *

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companies passed to the American Tobacco Company (merged), which has since carried on the business.

The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation but [175] were at once abandoned. Second, that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied.

Thus reaching the end of the second period and coming to the time of the bringing of the suit, brevity prevents us from stopping to portray the difference between the condition in 1890 when the (old) American Tobacco Company was organized by the consolidation of five competing cigarette concerns and that which existed at the commencement of the suit. That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the common stock of the new American Tobacco Company exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce indeed relatively over foreign commerce, and the commerce of the whole world, in the raw and manufactured products stand out in such bold relief from the undisputed facts which have been stated as to lead us to pass at once to the second fundamental proposition which we are required to consider. That is, the construction of the Anti-Trust Act and the application of the act as rightly construed to the situation as proven in consequence of having determined the ultimate and final inferences properly deducible from the undisputed facts which we have stated.

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The construction and application of the Anti-Trust Act:

If the Anti-Trust Act is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents it can only be because that law will be given a [176] more comprehensive application than has been affixed to it in any previous decision. This will be the case because the undisputed facts as we have stated them involve questions as to the operation of the Anti-Trust Act not hitherto presented in any case. Thus, even if the ownership of stock by the American Tobacco Company in the accessory and subsidiary companies and the ownership of stock in any of those companies among themselves were held, as was decided in *United States v. Standard Oil Co.*, to be a violation of the act and all relations resulting from such stock ownership were therefore set aside, the question would yet remain whether the principal defendant, the American Tobacco Company, and the five accessory defendants, even when divested of their stock ownership in other corporations, by virtue of the power which they would continue to possess, even although thus stripped, would amount to a violation of both the first and second sections of the act. Again, if it were held that the corporations, the existence whereof was due to a combination between such companies and other companies was a violation of the act, the question would remain whether such of the companies as did not owe their existence and power to combinations but whose power alone arose from the exercise of the right to acquire and own property would be amenable to the prohibitions of the act. Yet further: Even if this proposition was held in the affirmative the question would remain whether the principal defendant, the American Tobacco Company, when stripped of its stock ownership, would be in and of itself within the prohibitions of the act although that company was organized and took being before the Anti-Trust Act was passed. Still further, the question would yet remain whether particular corporations which, when bereft of the power which they possessed as resulting from stock ownership, although they were not inherently possessed of a sufficient residuum of power to cause them to be in [177] and of themselves either a restraint

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of trade or a monopolization or an attempt to monopolize, should nevertheless be restrained because of their intimate connection and association with other corporations found to be within the prohibitions of the act. The necessity of relief as to all these aspects, we think, seemed to the Government so essential, and the difficulty of giving to the act such a comprehensive and coherent construction as would be adequate to enable it to meet the entire situation, led to what appears to us to be in their essence a resort to methods of construction not compatible one with the other. And the same apparent conflict is presented by the views of the act taken by the defendants when their contentions are accurately tested. Thus the Government, for the purpose of fixing the illegal character of the original combination which organized the old American Tobacco Company, asserts that the illegal character of the combination is plainly shown because the combination was brought about to stay the progress of a flagrant and ruinous trade war. In other words, the contention is that as the act forbids every contract, and combination, it hence prohibits a reasonable and just agreement made for the purpose of ending a trade war. But as thus construing the act by the rule of the letter which kills, would necessarily operate to take out of the reach of the act some one of the accessory and many subsidiary corporations, the existence of which depend not at all upon combination or agreement or contract, but upon mere purchases of property, it is insisted in many forms of argument that the rule of construction to be applied must be the spirit and intent of the act and therefore its prohibitions must be held to extend to acts even if not within the literal terms of the statute if they are within its spirit because done with an intent to bring about the harmful results which it was the purpose of the statute to prohibit. So as to the defendants. While it is argued on the one hand that the forms by which various properties [178] were acquired in view of the letter of the act exclude many of the assailed transactions from condemnation, it is yet urged that giving to the act the broad construction which it should rightfully receive, whatever may be the form, no condemnation should follow, be-

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cause, looking at the case as a whole, every act assailed is shown to have been but a legitimate and lawful result of the exertion of honest business methods brought into play for the purpose of advancing trade instead of with the object of obstructing and restraining the same. But the difficulties which arise, from the complexity of the particular dealings which are here involved and the situation which they produce, we think grows out of a plain misconception of both the letter and spirit of the Anti-Trust Act. We say of the letter, because while seeking by a narrow rule of the letter to include things which it is deemed would otherwise be excluded, the contention really destroys the great purpose of the act, since it renders it impossible to apply the law to a multitude of wrongful acts, which would come within the scope of its remedial purposes by resort to a reasonable construction, although they would not be within its reach by a too narrow and unreasonable adherence to the strict letter. This must be the case unless it be possible in reason to say that for the purpose of including one class of acts which would not otherwise be embraced a literal construction although in conflict with reason must be applied and for the purpose of including other acts which would not otherwise be embraced a reasonable construction must be resorted to. That is to say two conflicting rules of construction must at one and the same time be applied and adhered to.

The obscurity and resulting uncertainty however, is now but an abstraction because it has been removed by the consideration which we have given quite recently to the construction of the Anti-Trust Act in the *Standard Oil case*. In that case it was held, without departing from [179] any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the *Trans-Missouri Freight Association* and *Joint Traffic cases*, 166 U. S. 290, and 171 U. S. 505). That

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such view was a mistaken one was fully pointed out in the *Standard Oil case* and is additionally shown by a passage in the opinion in the *Joint Traffic case* as follows (171 U. S. 568): "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it." Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding [180] that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration con-

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templates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against which would result from giving to the statute a narrow, unreasoning and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the *Standard Oil case*, the application of which rule to the statute we now, in the most unequivocal terms, reexpress and reaffirm.

Coming then to apply to the case before us the act as interpreted in the *Standard Oil* and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because although it was held in the *Standard* [181] *Oil case* that, giving to the statute a reasonable construction, the words "restraint of trade" did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.

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Considering then the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon [182] the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations:

(a) By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination.

(b) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by

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the plug war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England and the division of the world's business by the two foreign contracts which ensued.

(c) By the ever-present manifestation which is exhibited of a conscious wrong-doing by the firm in which the various transactions were embodied from the beginning, ever changing but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the [183] few who, it would seem, from the beginning contemplated the mastery of the trade which practically followed.

(d) By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade.

(e) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade.

(f) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders or employees, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-Trust Act, considerations which also serve to clearly demonstrate that the combination here assailed is within the law as to leave no doubt that it is our plain duty to apply its prohibitions.

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In stating summarily, as we have done, the conclusions which, in our opinion, are plainly deducible from the undisputed facts, we have not paused to give the reasons why we consider, after great consideration, that the elaborate arguments advanced to affix a different complexion to the case are wholly devoid of merit. We do not, for the sake of brevity, moreover, stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject-matter of the combination which we find to exist and the [184] combination itself are not within the scope of the Anti-Trust Act because when rightly considered they are merely matters of intrastate commerce and therefore subject alone to state control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the *Standard Oil case*, as not to require restatement.

Leading as this does to the conclusion that the assailed combination in all its aspects—that is to say, whether it be looked at from the point of view of stock ownership or from the standpoint of the principal corporation and the accessory or subsidiary corporations viewed independently, including the foreign corporations in so far as by the contracts made by them they became coöperators in the combination—comes within the prohibitions of the first and second sections of the Anti-Trust Act, it remains only finally to consider the remedy which it is our duty to apply to the situation thus found to exist.

The remedy:

Our conclusion being that the combination as a whole, involving all its coöperating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section, and an attempt to monopolize or a monopolization within the second section of the Anti-Trust Act, it follows that the relief which we are to afford must be wider than that awarded by the lower court, since that court merely decided that certain of the corporate defendants constituted combinations in violation of the first section of the act, because of the fact that they were formed by the union of previously competing concerns and that the other defend-

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ants not dismissed from the action were parties to such combinations or promoted their purposes. We hence, in determining the relief proper to be given, may not model our action upon that granted by the court below, but in order to enable us to [185] award relief coterminous with the ultimate redress of the wrongs which we find to exist, we must approach the subject of relief from an original point of view. Such subject necessarily takes a two-fold aspect—the character of the permanent relief required and the nature of the temporary relief essential to be applied pending the working out of permanent relief in the event that it be found that it is impossible under the situation as it now exists to at once rectify such existing wrongful condition. In considering the subject from both of these aspects three dominant influences must guide our action: (1) The duty of giving complete and efficacious effect to the prohibitions of the statute; (2) the accomplishing of this result with as little injury as possible to the interest of the general public; and (3) a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. Mindful of these considerations and to clear the way for their application we say at the outset without stopping to amplify the reasons which lead us to that conclusion, we think that the court below clearly erred in dismissing the individual defendants, the United Cigar Stores Company, and the foreign corporations and their subsidiary corporations.

Looking at the situation as we have hitherto pointed it out, it involves difficulties in the application of remedies greater than have been presented by any case involving the Anti-Trust Act which has been hitherto considered by this court:

First. Because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof, would afford no adequate

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measure of relief, since different [186] ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy.

Second. Because the methods of apparent ownership by which the wrongful intent was, in part, carried out and the subtle devices which, as we have seen, were resorted to for the purpose of accomplishing the wrong contemplated, by way of ownership or otherwise, are of such a character that it is difficult if not impossible to formulate a remedy which could restore in their entirety the prior lawful conditions.

Third. Because the methods devised by which the various essential elements to the successful operation of the tobacco business from any particular aspect have been so separated under various subordinate combinations, yet so unified by way of the control worked out by the scheme here condemned, are so involved that any specific form of relief which we might now order in substance and effect might operate really to injure the public and, it may be, to perpetuate the wrong. Doubtless it was the presence of these difficulties which caused the United States, in its prayer for relief to tentatively suggest rather than to specifically demand definite and precise remedies. We might at once resort to one or the other of two general remedies—(a) the allowance of a permanent injunction restraining the combination as a universality and all the individuals and corporations which form a part of or coöperate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured, a measure of relief which would accord in substantial effect with that awarded below to the extent that the court found illegal combinations to exist; or (b) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications for the purpose of preventing a continued violation of the law, and thus working out by a sale of the [187] property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act. But, having regard to the principles which we

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have said must control our action, we do not think we can now direct the immediate application of either of these remedies. We so consider as to the first because in view of the extent of the combination, the vast field which it covers, the all-embracing character of its activities concerning tobacco and its products, to at once stay the movement in interstate commerce of the products which the combination or its co-operating forces produce or control might inflict infinite injury upon the public by leading to a stoppage of supply and a great enhancement of prices. The second because the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. Under these circumstances, taking into mind the complexity of the situation in all of its aspects and giving weight to the many-sided considerations which must control our judgment, we think, so far as the permanent relief to be awarded is concerned, we should decree as follows:

1st. That the combination in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the first and second sections of the Anti-Trust Act.

2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of re-creating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law.

3d. That for the accomplish[188]ment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a further time not to exceed sixty days.

HARLAN, J., concurring and dissenting.

4th. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequence of the action of the court in determining an issue on the subject or in accepting a plan agreed upon, it shall be the duty of the court, either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce or by the appointment of a receiver, to give effect to the requirements of the statute.

Pending the bringing about of the result just stated, each and all of the defendants, individuals as well as corporations, should be restrained from doing any act which might further extend or enlarge the power of the combination, by any means or device whatsoever. In view of the considerations we have stated we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property.

While in many substantial respects our conclusion is in accord with that reached by the court below, and while also the relief which we think should be awarded in some respects is coincident with that which the court granted, in order to prevent any complication and to clearly define the situation we think instead of affirming and modifying, our decree, in view of the broad nature of our conclusions, should be one of reversal and remanding with directions to the court below to enter a decree in conformity with this opinion and to take such further steps as may be necessary to fully carry out the directions which we have given.

And it is so ordered.

[189] Mr. Justice HARLAN concurring in part and dissenting in part.

I concur with many things said in the opinion just delivered for the court, but it contains some observations from which I am compelled to withhold my assent.

I agree most thoroughly with the court in holding that the principal defendant, the American Tobacco Company and its accessory and subsidiary corporations and companies, in-

PEARLAN, J., concurring and dissenting:

cluding the defendant English corporations, constitute a combination which, "in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately," is illegal under the Anti-Trust Act of 1890, and should be decreed to be in restraint of interstate trade and an attempt to monopolize and a monopolization of part of such trade.

The evidence in the record is, I think, abundant to enable the court to render a decree containing all necessary details for the suppression of the evils of the combination in question. But the case is sent back, with *directions* further to hear the parties, by evidence or otherwise, "for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, and of *recreating* out of the elements *now* composing it, a new condition" which shall not be repugnant to law. The court, in its opinion, says of the present combination, that its illegal purposes are overwhelmingly established by many facts, among others,

"by the ever-present manifestation which is exhibited of a *conscious wrong-doing* by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another, or in several, so as to obscure the result actually attained, nevertheless uniform in their manifestations of the purpose to restrain [190] others, and to monopolize and retain power in the hands of the few, who, it would seem, from the beginning contemplated the mastery of the trade which practically followed. By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade."

The court further says of this combination and monopoly:

"The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence, from the beginning, of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised to monopolize the trade, by driving competitors out of business, which were ruthlessly carried out, upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible."

HAMAS, J., concurring and dissenting.

But it seems that the course I have suggested is not to be pursued. The case is to go back to the Circuit Court in order that out of the elements of the old combination a new condition may be "re-created" that will not be in violation of the law. I confess my inability to find, in the history of this combination, anything to justify the wish that a new condition should be "re-created" out of the mischievous elements that compose the present combination, which, together with its component parts, have, without ceasing, pursued the vicious methods pointed out by the court. If the proof before us—as it undoubtedly does—warrants the characterization which the court has made of this monster combination, why cannot all necessary directions be now given as to the terms of the decree? In my judgment, there is enough in the record to enable this court to formulate specific directions as to what the decree should contain. Such directions would [191] not only end this litigation, but would serve to protect the public against any more conscious wrongdoing by those who have persistently and "ruthlessly," to use this court's language, pursued illegal methods to defeat the act of Congress.

I will not say what, in my opinion, should be the form of the decree, nor speculate as to what the details ought to be. It will be time enough to speak on that subject when we have the decree before us. I will, however, say now that in my opinion the decree below should be affirmed as to the Tobacco company and its accessory and subsidiary companies, and reversed on the cross appeal of the Government.

But my objections have also reference to those parts of the court's opinion reaffirming what it said recently in the *Standard Oil case* about the former decisions of this court touching the Anti-Trust Act. We are again reminded, as we were in the *Standard Oil case*, of the necessity of applying the "rule of reason" in the construction of this act of Congress—an act expressed, as I think, in language so clear and simple that there is no room whatever for construction.

Congress, with full and exclusive power over the whole subject, has signified its purpose to forbid *every* restraint of interstate trade, in whatever form, or to whatever extent, but

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the court has assumed to insert in the act, by construction merely, words which make Congress say that it means only to prohibit the "undue" restraint of trade.

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the *Standard Oil case*, was in accordance with our previous decisions in the *Trans-Missouri* and *Joint Traffic cases*, 166 U. S. 290, 171 U. S. 505, if we resort to *reason*. This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two cases for the [192] court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time in the *Standard Oil case*, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression, the majority, in the *Trans-Missouri* and *Joint Traffic cases*, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as "unreasonable," and thereby makes Congress say what it did not say, what, as I think, it plainly did not intend to say and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the Government has exclusive cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason;" for, it may be assumed that they knew quite as well as others what

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the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason" and felt and said time and again [198] that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation*. Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the Anti-Trust Act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta*, pure and simple.

These views are fully discussed in the dissenting opinion delivered by me in the *Standard Oil case*. I will not repeat what is therein stated, but it may be well to cite an additional authority. In the *Trade-Mark cases*, 100 U. S. 82, the court was asked to sustain the constitutionality of the statute there involved. But the statute could not have been sustained except by inserting in it words not put there by Congress. Mr. Justice Miller, delivering the unanimous judgment of the court, said:

"If we should, in the case before us, undertake to make by *judicial construction* a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

This language was cited with approval in *Employers' Liability cases*, 207 U. S. 463, 502. I refer to my dissenting opinion in the *Standard Oil case*, *ante*, p. 82, as containing a full statement of my views of this particular question.

For the reasons stated, I concur in part with the court's opinion and dissent in part.

Final Decree.**UNITED STATES OF AMERICA vs. THE AMERICAN TOBACCO
COMPANY ET AL.**

(In the Circuit Court of the United States for the Southern
District of New York.)

FINAL DECREE.

The following are the injunctive provisions of the final decree of the Circuit Court, entered upon and in pursuance of the mandate of the Supreme Court:

This court, having heard the parties as directed by the Supreme Court of the United States, it is further ascertained and determined, and

Ordered, adjudged, and decreed that said plan hereinabove set forth is a plan or method which, taken with the injunctive provisions hereinafter set forth, will dissolve the combination heretofore adjudged to be illegal in this cause, and will recreate out of the elements now composing it a new condition which will be honestly in harmony with, and not repugnant to, the law, and without unnecessary injury to the public or the rights of private property.

It is further ordered, adjudged, and decreed that the said plan as hereinabove set forth be, and it is hereby, approved by this court, and the defendants herein are respectively directed to proceed forthwith to carry the same into effect.

The necessities of the situation in the judgment of this court requiring the extension of the period for carrying into execution said plan to a further time not to exceed 60 days from December 30, 1911.

It is further ordered, adjudged and decreed that the defendants be allowed until February 28, 1912, to carry said plan into execution.

It is further ordered, adjudged, and decreed that the defendants, their officers, directors, servants, agents, and employees be, and they are hereby, severally enjoined and restrained as follows:

From continuing or carrying into further effect the combination adjudged illegal in this cause, and from entering into or forming any like combination or conspiracy, the effect of which is or will be to restrain commerce in tobacco or its products or in articles used in connection with the

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manufacture and trade in tobacco and its products, among the States or in the Territories or with foreign nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by the defendants, as adjudged herein in violation of the act of Congress approved July 2, 1890, either:

1. By causing the conveyance of the factories, plants, brands or business of any of the 14 corporations among which the properties and businesses now in the combination are to be distributed, to-wit: The American Tobacco Company, Liggett & Myers Tobacco Company, P. Lorillard Company, American Snuff Company, George W. Helme Company, Weyman-Bruton Company, R. J. Reynolds Tobacco Company, British-American Tobacco Company, Limited, Porto Rican-American Tobacco Company, MacAndrews & Forbes Company, J. S. Young Company, The Conley Foil Company, The Johnson Tin Foil & Metal Company and United Cigar Stores Company, to any other of said corporations; by placing the stocks of any one or more of said corporations in the hands of voting trustees or controlling the voting power of such stocks by any similar device; or

2. By making any express or implied agreement or arrangement together or one with another like those adjudged illegal in this cause, relative to the control or management of any of said 14 corporations, or the price or terms of purchase, or of sale, of tobacco or any of its products, or the supplies or other products dealt with in connection with the tobacco business, or relative to the purchase, sale transportation or manufacture of tobacco, or its products or supplies or other products dealt with as aforesaid, by any of the parties hereto, which will have a like effect in restraint of commerce among the States, in the Territories and with foreign nations to that of the combination, the operation of which is enjoined in this cause; or by making any agreement or arrangement of any kind with any other of such corporations under which trade or business is apportioned between such corporations, in respect either to customers or localities.

3. By any of said 14 corporations retaining or employing the same clerical organization, or keeping the same office or offices, as any other of said corporations.

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4. By any of said 14 corporations retaining or holding capital stock in any other corporation any part of whose stock is also retained and held by any other of said corporations; provided, however, that this prohibition shall not apply to the holding by the Porto Rican-American Tobacco Company and American Cigar Company of stock in Porto Rican Leaf Tobacco Company, nor shall it apply to the holding of stock of the National Snuff Company, Limited, by Weyman-Bruton Company and British-American Tobacco Company, Limited.

5. By any of said 14 corporations doing business directly or indirectly under any other than its own corporate name or the name of a subsidiary corporation controlled by it; provided, however, that in case of a subsidiary corporation the controlling corporation shall cause the products of such subsidiary corporation which are sold in the United States to bear the name of the manufacturer, to bear also a statement indicating the fact of such control.

6. By any of said 14 corporations refusing to sell to any jobber any brand of any tobacco product manufactured by it except upon condition that such jobber shall purchase from the vendor some other brand or product also manufactured and sold by it; provided, however, that this prohibition shall not be construed to apply to what are known as "combination orders" under which some brand or product may be offered to a jobber or dealer at a reduced price on condition that he purchase a given quantity of some other brand or product.

It is further ordered, adjudged and decreed that during a period of five years from the date hereof, each of said 14 corporations hereinbefore named, its officers, directors, agents, servants and employees, are hereby enjoined and restrained as follows:

1. None of the said 14 corporations shall have any officer or director who is also an officer or director in any other of said corporations.

2. None of said 14 corporations shall retain or employ the same agent or agents for the purchase in the United States of tobacco leaf or other raw material, or for the sale in the United States of tobacco or other products, as that of any other of said corporations.

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8. None of said 14 corporations shall directly or indirectly acquire any stock in any other of said corporations, or purchase or acquire any of the factories, plants, brands or business of any other of said corporations, or make loans or otherwise extend financial aid to any other of said corporations.

The provisions of this decree shall apply only to trade and commerce in or between the several States and Territories and the District of Columbia, and trade and commerce between the United States and foreign nations.

It is further ordered, adjudged and decreed that British-American Tobacco Company, Limited, and The Imperial Tobacco Company (of Great Britain and Ireland), Limited, shall not act as agent for each other, nor employ a common agent, for the purchase of leaf tobacco in the United States, and neither of said two companies shall unite with any of the said 14 corporations among which the properties and businesses now in the combination are to be distributed, in the employment of a common agent for the purchase of tobacco leaf in the United States.

It is further ordered, adjudged and decreed that each of the 29 individual defendants in this suit be enjoined and restrained from at any time within three years from the date of this decree, acquiring, owning or holding, directly or indirectly, any stock, or any legal or equitable interest in any stock in any one of said 14 corporations, excepting British-American Tobacco Company, Limited, in excess of the amount to which he will be entitled under the provisions of the plan when the same shall have been carried out as proposed as the present owner of the amount of stocks in said several companies shown by the affidavits of said several defendants filed herein on the 16th day of November, 1911; provided, however, that any of said defendants may, notwithstanding this prohibition, acquire from any other or others of said defendants, or in case of death from their estates, any of the stock held by such other defendant or defendants in any of said corporations.

It is further ordered, adjudged and decreed that the new companies whose organization is provided for in the plan hereinabove set forth, to-wit: Liggett & Myers Tobacco Com-

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pany, P. Lorillard Company, George W. Helms Company, Weyman-Bruton Company and J. S. Young Company, shall, after their formation and by appropriate proceedings, be made parties defendant to this cause and subject to the provisions of this decree and bound by the injunctions herein granted.

It is further ordered, adjudged and decreed that any party hereto may make application to the court for such orders and directions as may be necessary or proper in relation to the carrying out of said plan, and the provisions of this decree.

It is further ordered, adjudged and decreed that the costs of this action shall be paid by the defendants other than R. P. Richardson, Jr., & Company, Incorporated, as to whom the suit has heretofore been dismissed, and the payment by the defendant The American Tobacco Company of the reasonable costs and counsel fees of the committees organized for the protection of the 6 per cent bonds, 4 per cent bonds and preferred stock of The American Tobacco Company, is hereby approved.

It is further ordered, adjudged and decreed that the defendants The American Tobacco Company, MacAndrews & Forbes Company, American Snuff Company, and each of them, and their and each of their officers, directors, servants, agents, and employees, be severally enjoined and restrained as in said plan set forth, from voting stocks, exercising influence or control over other companies or gaining possession of other companies through the use of securities temporarily held by them respectively under said plan in each and every case in which it is provided in and by the said plan that any of said three last named defendants shall be so enjoined.

It is further ordered, adjudged and decreed that such books and papers of the defendants The American Tobacco Company and S. Anargyros, or either of them, as relate to the suit of *The Ludington Cigarette Machine Company vs. S. Anargyros* and *The American Tobacco Company*, or the subject-matter thereof or any part thereof, be preserved by the said defendants respectively until after the accounting, if any shall take place in said suit, and said suit shall be finally determined and ended.

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It is further ordered, adjudged and decreed that jurisdiction of this cause is retained by this court for the purpose of making such other and further orders and decrees, if any, as may become necessary for carrying out the mandate of the Supreme Court.

November 16, 1911.

E. HENRY LACOMBE,
Circuit Judge.

ALFRED C. COXE,
Circuit Judge.

H. G. WARD,
Circuit Judge.

WALTER C. NOYES,
Circuit Judge.

[229] UNITED STATES *v.* STANDARD SANITARY MFG. CO. ET AL.*

(District Court, E. D. Michigan, S. D. March 8, 1911.)

[187 Fed. Rep. 229.]

CRIMINAL LAW (§ 42).—IMMUNITY.—Act Feb. 25, 1908, c. 755, 32 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 1142), as amended by Act June 30, 1906, c. 3920, 34 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1168), prohibiting prosecution for a transaction concerning which accused, in obedience to a subpoena, gives testimony in a proceeding under the Anti-Trust Law, Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), does not immunize persons who have filed answers under oath in such a proceeding.^b

The Standard Sanitary Manufacturing Company and others being under indictment, the government demurs to pleas of immunity. Pleas overruled.

See, also, 187 Fed. 232.

Edwin P. Grosvenor, Sp. Asst. Atty. Gen., and *Frank H. Watson*, U. S. Atty.

Stevenson, Carpenter and Butzell, Noble, Jackson and Hubbard, Lyon and Hunter, and *Moritz Rosenthal*, for defendants.

* For opinion in equity suit (187 Fed. 232) see *post*, p. 255.

For opinion of Circuit Court, District of Maryland, on the merits (191 Fed. —), see *post*, p. 895.

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DENSON, District Judge (sitting by designation).

The act of February 25, 1903 (32 St. L. 904), as amended June 30, 1906 (34 St. L. 798), provides that no person shall be prosecuted for or on account of any transaction concerning which he, in obedience to a subpoena, gives testimony under oath, in any proceeding under the so-called Sherman act or anti-trust law.

Before the filing of these indictments, the respondents here were made defendants in an equity suit brought by the United States, under section 4 of the anti-trust law to enjoin the same alleged combination which forms the basis of these indictments. The bill did not waive oath to the answer, and so, in legal effect, demanded a sworn answer. The defendants did answer under oath. They now claim freedom from criminal prosecution, and rely upon the terms of the immunity statute above recited.

It is clear that the answers were under oath, and were demanded and given in such a "proceeding under" the Anti-Trust Act as the immunity statute contemplates. The only question is whether these answers constitute "testimony (or) evidence under oath," or "in obedience to a subpoena."

[230] It is also clear that the filing of the answer may be thought of as something done "in obedience to a subpoena," because it is required by law as a step following upon the issue of a chancery subpoena.

So, too, it cannot be doubted that an answer under oath was, under the old equity practice and in a proper case, evidence, and often controlling evidence, upon final disposition of an equity suit.

It follows that, without any distortion of the language into grotesque or unknown form or meaning, the respondents can make it spell immunity in this case; but it does not follow, even under the rules of construction of criminal statutes, that respondents must have a favorable interpretation just because such interpretation is possible. The true criterion must be the fair and reasonable meaning—the sense in which it is probable that Congress used the chosen words.

Under the equity practice, an answer is a pleading as is a plea or demurrer. This is the primary, and in the typical

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case the only, function of the answer. Under certain conditions, it took on a secondary or incidental function, and proffered itself as evidence. This was because of the situation attendant upon a bill of discovery. Bills of discovery are now practically unknown, and it is at least doubtful (particularly under this section 4) whether such a bill can now be maintained at all without aid from some other ground of equity jurisdiction. It is not to be inferred, as respondents say, that the individual defendants were joined in the equity suit only for the purpose of obtaining discovery. The reasonable inference is that they were joined so as to obtain an effective injunction.

Bills of discovery being substantially discontinued, the resulting evidential character of the answer has practically disappeared. Skilled equity counsel remember this historical, but obsolescent, function of the answer; but probably laymen generally, as well as most lawyers in the code states and many lawyers in other states, would now be surprised to be told that an "answer" is "testimony." I cannot think that Congress so intended.

The same conclusion follows from considering the "subpoena" subject. The common understanding, I think, of "giving testimony in obedience to a subpoena" or "producing evidence in obedience to a subpoena," would be that reference was had to the familiar witnesses' subpoena, and not to the equity summons. The latter meaning is not impossible, but is, to me, strained and unnatural.

Even if the answer is "evidence," it is not happily described as "produced in obedience to" the subpoena. True, the subpoena gives the defendant notice that he must answer, but this compulsion comes not from the writ but from the rules of the court. When the subpoena, with the possible aid of contempt proceedings, has produced an appearance, it has exhausted its function as a writ.

Further, if an answer may be thought to be filed, "in obedience to" the subpoena and is framed with evidential purpose, its character as evidence is only inchoate. It may never become evidence. It must be, for 30 days, subject to exceptions, and then, if it escapes or survives exception, it must wait another 30 days for replication or for setting

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down. Only then does it get permanent status. This consideration does not seem to be important, but it emphasizes the difference between an answer and ordinary "testimony" or "evidence."

It is not conclusive against a plain construction that it leads to rather absurd results in some cases, but this may furnish an additional reason for not adopting an unusual meaning. If respondents are right, immunity results from a sworn answer to a bill not waiving the oath, but it does not result from an unsworn answer to the same bill, nor from an answer, sworn or unsworn, to the same bill containing a waiver, nor from a sworn plea to the same bill in either form, though all these answers and this plea might contain an identical disclosure. The injury to defendants is the same in each supposed case; for an admission can be used against the person admitting just as well in one case as in the other. It is not likely that immunity was intended to depend on whether a pleader omitted to waive an oath, or that it is important whether such omission was deliberate or inadvertent.

I see no significance, helpful to respondents, in the fact that in this immunity statute reference is made to persons who gave testimony, and in the commerce and labor statute reference is made to persons who "gave testimony as witnesses." Although possible reasons are suggested for a distinction, I see no substantial reason, and I should draw the inference that Congress uses the two phrases indiscriminately, intending that one should mean the same as the other.

Respondents urge that the full right of immunity must be maintained, else the government cannot get the information necessary to convict. This is true; but it does not aid in deciding what this act means. I feel confident that the construction I have adopted will not cripple any necessary governmental activity. I have not been able to conceive a case where it will be necessary to get information regarding a crime by filing a bill and demanding answer under oath.

Defendants under such a bill as was filed here are not, with my construction of this immunity statute, in danger of losing any constitutional rights. They may absolutely refuse to incriminate themselves by any statement, by whatever name

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it may be called, and with or without oath. It may not be pleasant to take this position, but such is the constitutional method of preserving a constitutional right.

There is no difference between the respective pleas of the different individual respondents, and, with my view of the statute, no difference between the seven different pleas of each respondent. In so far as pleas 5, 6, and 7 go beyond the first four, they state either legal conclusions, immaterial matters, or matters of defense under a general plea of not guilty. All the pleas of immunity will be overruled.

**[232] UNITED STATES v. STANDARD SANITARY
MFG. CO. ET AL.***

(Circuit Court, E. D. Pennsylvania. April 22, 1911.)

[187 Fed. Rep., 232.]

COURTS (§ 349)—MASTERS—JURISDICTION—TAKING TESTIMONY IN DIFFERENT DISTRICT.—Where an examiner is appointed by the court of the district in which the suit is pending, as authorized by equity rule 67, to take testimony, he may lawfully discharge his duty in another district; the court of that district being authorized to issue subpoenas commanding persons residing within the district to appear and testify before such examiner or master.^b

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 349.]

COURTS (§ 349)—MASTERS—JURISDICTION—TAKING TESTIMONY IN DIFFERENT DISTRICT.—Where a master is appointed to take testimony in the district in which a suit is pending, and proceeds to take testimony in another district, persons living in the latter district, whose legal domicile is elsewhere, may be compelled to appear, and any person found in such district, who answers a subpoena and appears before the examiner, may be lawfully examined.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 349.]

COURTS (§ 349)—EXAMINATION BEFORE MASTER—COERCING WITNESS—MATERIALITY OF TESTIMONY.—Where witnesses appear before a master taking testimony in a district other than that in which he was appointed, and on his refusing to answer questions an application is made to the court of such district to coerce the witness, it is the duty of such judge to compel the production of the evidence,

* For opinion in Criminal Case (187 Fed. 229) see *ante*, p. 251.

For opinion of Circuit Court, District of Maryland (191 Fed. —), see *post*, p. 286.

^b Syllabus copyrighted, 1911, by West Publishing Company.

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although the judge deems it incompetent, irrelevant, or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that it cannot be competent, material, or relevant, and that it would be an abuse of process to compel its production.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 349.]

CRIMINAL LAW (§ 42)—IMMUNITY—PRIVILEGE AS WITNESS—SHERMAN ANTI-TRUST ACT—STATUTES—CONSTRUCTION.—The Sherman Act (Act Cong. Feb. 25, 1903, c. 755, 32 Stat. 904 [U. S. Comp. St. Supp. 1909, p. 1142]), as amended by Act June 30, 1906, c. 3920, 34 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1168), provides that for the enforcement of the provisions of the act a specified sum was appropriated to employ special counsel to conduct proceedings, suits, and prosecutions thereunder, provided that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he might testify in any proceeding, suit, or prosecution under the act, etc. *Held* that, though the act applies to witnesses, whether called in a criminal or a civil suit, it did not extend immunity to witnesses called by the defense in a civil suit to restrain alleged violations of the act, especially to defendants called by co-defendants, the effect of which would be to render the statute abortive.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.]

Suit by the United States against the Standard Sanitary Manufacturing Company and others to restrain the continuance of certain alleged conspiracies and agreements in restraint of interstate commerce in sanitary enameled iron ware. On motion of the Colwell Lead Company and others to compel their co-defendants, Max Goebel and certain others, to answer questions. Denied.

See, also, 187 Fed. 229.

[233] *Edwin P. Grosvenor*, Sp. Asst. Atty. Gen., and *George W. Wickersham*, Atty. Gen., for the United States.
Robert B. Honeyman, for defendant Colwell Lead Co.
Herbert Noble, for defendant witnesses.
Hillary C. Messimer, for McCrum and Gates.

HOLLAND, District Judge.

This is a motion by defendants Colwell Lead Company, Jesse T. Duryea, and Bert O. Tilden to compel co-defendants Max Goebel, Lloyd G. McCrum, Howard T. Gates, Francis J. Torrance, and Theodore Ahrens to answer certain ques-

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tions. The motion is made in a suit in equity, instituted at Baltimore July 21, 1910, in the Circuit Court of the United States for the District of Maryland, and brought under section 4 of the Sherman Anti-Trust Act, to restrain the continuance of certain alleged conspiracies and agreements in restraint of interstate trade and commerce in sanitary enameled ironware.

There are about 34 individuals and 16 corporations defendants in this suit. The same individuals and corporations, charged with having combined and conspired in restraint of interstate trade in sanitary enameled ironware, were indicted on December 7, 1910, by the federal grand jury for the eastern district of Michigan. The indictments and the bill in equity relate to the same matters and transactions.

In the Baltimore suit, in which this motion arose, a special examiner was appointed by the court October 22, 1910, by agreement, "to take and report to the court the evidence adduced or offered by the petitioner and the defendants, respectively, with full authority as such special examiner according to the rules and practice in such case made and provided." The order further provides "that said examiner may, upon application of any of the parties, hold such hearings and receive testimony in behalf of any party, at such time and such place without the district of Maryland as he may designate and appoint"; due notice being required. The order also provides "that the respective parties may from time to time agree as to the time and place of taking proofs outside of the district of Maryland."

The government completed the taking of its testimony on December 21, 1910, and on February 14, 1911, the defendants commenced the taking of testimony, and there have been hearings from time to time for this purpose.

The defense of the Colwell Lead Company, Duryea, and Tilden, set up by their answer to the bill, upon which they now rely, is, in the main, identical with that of the other defendants. There are, however, some minor differences, affecting particularly the manner of doing business by the company; and it insists that there is a necessity for it to call the other defendants to prove these allegations. The com-

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pany, Mr. Duryea, and Mr. Tilden are represented in this motion by separate counsel; and the question here involved arose on April 4 at a hearing in Philadelphia, called by their counsel. The testimony was being taken by the examiner appointed by the Maryland court. Subpoenas had duly issued from this court, and five witnesses were put upon the stand, each one of whom is a defendant in the criminal [234] proceeding and in the bill in this case. None of these witnesses objected to appearing as such before the examiner at Philadelphia, and no objection to the taking of testimony was made by the witnesses themselves or the government until after they had refused to answer. All of them reside at points more than 100 miles from the district of Maryland, although none reside in this district. They, however, appeared in answer to a subpoena before the examiner at a place agreed upon by the parties, and refused to answer certain questions put to them by counsel for the Colwell Lead Company, upon the ground that their answers might incriminate them. Thereupon counsel for the company moved this court to compel them to answer, and the government contends that this court has no jurisdiction to entertain this motion, because none of the witnesses reside in this district.

From the statement in the government's brief, I take it that the taking of testimony at Philadelphia before the examiner, on the 4th day of April, had been agreed upon by the government and counsel for the company; and from the affidavit filed by the latter's counsel it appears that the names and the places of residence of the witnesses to be examined on behalf of the company at the meeting were given to the Assistant Attorney General a day or more before, so that the government was in possession of the information as to the legal domicile of the witnesses to be examined, and was also informed that the testimony of these witnesses would be taken before the examiner at this meeting. The government appeared, but raised no objection to the examination of these witnesses here upon the ground that the legal residence of the respective witnesses was without this district.

1. It has been determined that the appointment of a master or examiner by the court of the district where the suit is

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pending, under the sixty-seventh rule in equity, to take testimony, may lawfully discharge this duty in another district, and that the court in the latter district is empowered to issue subpoenas commanding persons residing in the district to appear and testify before such examiner or master. *In re Steward* (C. C.) 29 Fed. 813; *Rose's Code of Fed. Procedure*, § 1037b; *Johnson Steel Street Rail Co. v. North Branch Steel Co.* (C. C.) 48 Fed. 191; *White v. Toledo, etc., Co.*, 79 Fed. 134, 135, 24 C. C. A. 467.

2. Persons who are living in the latter district, whose legal domicile is elsewhere, can be compelled to appear (*In re Steward, supra*), and any person found in the latter district who answers a subpoena and appears before the examiner, may be lawfully examined (*Blood v. Morrin* [C. C.] 140 Fed. 918; *Mutual Ben. Life Ins. Co. v. Robison*, 58 Fed. 732, 7 C. C. A. 444, 22 L. R. A. 325).

If the witnesses were lawfully examined here, this would be the proper tribunal to entertain this motion; but it is further urged by the government that, even if this court can properly consider the motion, the witnesses should not be required to answer, because the questions put to them by counsel for the Colwell Lead Company, which they have refused to answer, are neither relevant nor material.

3. It is urged that the amended answer of the company, Duryea, and Tilden sets up no separate defense from that of the other defend[235]ants, except in minor details, in support of which the questions put to the witnesses were not at all relevant or material; but this, we think, is not a matter into which this court may inquire.

"It is not the duty of an auxiliary court or judge, within whose jurisdiction testimony is being taken in a suit pending in the court of another district, to consider or determine the competency, materiality, or relevancy of the evidence which one of the parties seeks to elicit. It is the duty of such a court or judge to compel the production of the evidence, although the judge deems it incompetent, irrelevant, or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence sought cannot possibly be competent, material, or relevant, and that it would be an abuse of the process of the court to compel its production." *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521; *Dowagiac Mfg. Co. v. Lockren*, 148 Fed. 211 [74 C. C. A. 341].

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Having concluded that the testimony offered does not so clearly and affirmatively appear to be irrelevant and immaterial as to warrant its exclusion, and that the motion is properly entertained by this court, it follows that, if the witnesses are entitled to an immunity from prosecution under the act of Congress of February 25, 1903 (32 Stat. 904, c. 755 [U. S. Comp. St. Supp. 1909, p. 1142]), and its supplement (Act June 30, 1906, c. 3920, 34 Stat. 798 [U. S. Comp. St. Supp. 1909, p. 1168]), they will be compelled to answer, notwithstanding they have claimed their privilege of silence under the provisions of the fifth amendment to the Constitution.

The Colwell Lead Company insists that the testimony of these witnesses is important in support of its defense. The government, however, contends:

"That not one of these questions is material to the defense of the company, or of Mr. Duryea or Mr. Tilden, but that each of the questions is addressed to the witness defendant for the sole purpose of having him incriminate himself and thereby gain immunity."

Accordingly, the Assistant Attorney General, for the government, notified each witness, as he was called, that as the transactions being inquired into in this civil suit are the same transactions which are the subject of the Detroit indictments, it was probable that anything he (the witness) might say, which would be material, would incriminate him. He was accordingly advised that, relying upon the fifth amendment, he might refuse to answer questions upon these matters. He was further advised that, if he did answer, he would waive his constitutional privilege, and would gain no immunity thereby, and that, if counsel insisted that he answer, he should refuse until the court ordered him to do so. Thereupon the several defendants answered certain questions, but refused to answer others, and this proceeding is to determine whether they shall be ordered by the court to answer such other questions.

4. The immunity statutes which are pertinent are those enacted for the enforcement of the provision of the Sherman Act. They are the act of February 25, 1903, and the amendment of June 30, 1906. The Supreme Court held in *Hale v.*

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Henkel, 201 U. S. 43, 26 Sup. Ct. 870, 50 L. Ed. 652, that the language of the act of February 25, 1903, is sufficiently broad to give immunity to a witness summoned on behalf of the government, and that a witness so called is obliged to answer. The only question, therefore, involved in this case, is whether the immunity provision under consideration applies to these witnesses called by a defendant. If the act extends immunity to them, they must answer. They will not be permitted to claim their constitutional privilege of silence. *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. Was it, then, the intention of Congress, in enacting this immunity legislation for the purpose of enforcing the Sherman Act, to extend its provisions to include witnesses called by the defense in any proceeding, suit, or prosecution under the act? Omitting all the parts of the immunity legislation, except that with which we are concerned in this case, it reads as follows:

"That for the enforcement of the provisions of the act entitled * * * 'An act to protect trade and commerce against unlawful restraints and monopolies,' * * * the sum of \$500,000 * * * is hereby appropriated * * * to employ special counsel * * * to conduct proceedings, suits and prosecutions under said act, * * * provided that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify in any proceeding, suit or prosecution under said act. * * * And the amendment enacted June 30th, 1906, provides that immunity shall extend only to a natural person, who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

It is unnecessary, in disposing of this motion, to inquire into the question as to whether Congress intended to restrict the provisions of the act to give immunity only to witnesses called by the government. The question here is whether or not Congress intended to give immunity from prosecution under the Sherman Act to persons who are defendants in suits and prosecutions instituted by the government who are called as witnesses by their co-defendants. Such a construction of the act of 1903 and its amendment would result in practically wiping out the criminal provisions of the Sherman Act.

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The main issue in the bill filed under section 4 of the act is the criminal fact upon which the indictments are founded under section 1. If the immunity can be claimed in a civil proceeding under the act, there seems to be no reason why it may not be claimed in a criminal proceeding for the same cause of action. If these defendants can be called by their co-defendants as witnesses in a civil suit, they can be called by their co-defendants as witnesses in the pending criminal prosecution. Any witness to which the act extends the immunity can be called in a criminal or a civil suit. There is no question but that any witness called by the government in a civil suit can as well be called in a criminal proceeding and compelled to answer. Equally true would it be that any other party's immuned witnesses (if there are any under the act) could be called in either a civil or criminal proceeding and receive immunity.

If, then, it was the intention of Congress to permit defendants to call each other and give them immunity, it is clear that the power to do so extended as well to civil proceedings as to criminal prosecutions. Was such the intention? If it was, it enables a defendant in either a civil suit or criminal prosecution under the act to be called as a witness for a co-defendant, and thereby become immuned against [237] the conviction under the indictment, and each defendant could call the other, until they brought about an immunity of all the defendants in the indictment. It would follow that no conviction under the act could in any case be had, because the trial of the offenders would simply afford them the opportunity of calling each other as witnesses, and the result of the trial would be an expensive performance on the part of the government to enable the defendants to secure immunity. Such a construction, leading to the absurd and unreasonable results indicated, cannot, under the authorities, be adopted by this court, when the statute is susceptible of a rational construction, such as will enable a proper and effective enforcement of all the provisions of the act.

But, aside from the absurd results flowing from such a construction, the language of this immunity statute would indi-

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cate that Congress did not intend the act should receive the construction placed upon it by counsel for the Colwell Lead Company. It opens with a statement that the enactment is "for the enforcement of the provisions" of the Sherman Act, among other acts mentioned in the enacting clause, and there is an appropriation made for the purpose of enabling the Attorney General "to conduct proceedings, suits and prosecutions" under the Sherman Act and the other acts; and in order that the provisions of these acts may be enforced, there is a proviso granting immunity to certain persons against prosecution "on account of anything concerning which they may testify * * * in any proceeding, suit or prosecution" under these acts. The primary object apparently for the enactment of this legislation was "the enforcement of the provisions of the Sherman Anti-Trust Act," together with the others mentioned; but there is nothing to indicate that it was the intention of the makers of the law to extend the privilege of immunity to witnesses called by the defense, especially defendants called by co-defendants in a suit instituted by the government. It was not for the purpose of aiding the defense in "proceedings, suits or prosecutions" under the act, but for the purpose of "enforcing the provisions" of the acts, that the immunity clause was created.

Failing to find any warrant in the language used by Congress for the construction insisted upon by the Colwell Lead Company, and in view of the unreasonable and absurd results which would be brought about by such a view of the enactment, it is our duty, as was said in *Reg v. Skeen*, 8 Cox's Criminal Cases, 143, to put that construction on the language of the act which will make it effectual, and not make it abortive.

We hold that it was not the intention of Congress, in passing the immunity act for the enforcement of the provisions of the Sherman law, either in civil or criminal proceedings, to extend immunity to defendants called as witnesses by co-defendants to testify in the latter's behalf, so that the motion to compel the witnesses to answer the questions is overruled.

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[522] LAWLOR ET AL *v.* LOEWE ET AL.*

(Circuit Court of Appeals, Second Circuit, April 10, 1911. Petition for Rehearing, May 8, 1911.)

[187 Fed. Rep. 522.]

MONOPOLIES (§ 12)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—BOYCOTT.—If it be shown that individuals have combined together to induce a manufacturer engaged in interstate commerce to conduct his business as they wish, and upon his refusal further combine not only to prevent him from manufacturing articles intended for interstate commerce, but also to prevent his vendees in other states from reselling the articles which they had imported from the state of manufacture, or from further negotiating for the purchase and intertransportation of such articles, the combiners intending thereby to destroy or obstruct an existing interstate traffic, such combination of individuals must be held to have essentially obstructed the free flow of commerce between the states, and is in violation of Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and when such obstruction is shown to have brought about an injury to a person's business, damages may be recovered, although the impelling motive of the combination was an effort to better the condition of the combiners, which, except for the anti-trust act, might be proper and lawful.^b

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.]

TRADE UNIONS (§ 4)—AGENTS OF LABOR ORGANIZATION—LIABILITY OF MEMBERS FOR UNLAWFUL ACTS.—A clause in the constitution of a labor organization which provides that certain of its officers "shall use all the means in their power" to bring nonunion shops into the trade, does not necessarily imply that these officers shall use other than lawful means, and the fact alone that a member contributes money to the support of the organization does not make him responsible as a principal for unlawful acts of the officers or their agents, but in order that his contributions shall have such effect something more must be shown, as that unlawful means had been so frequently used with the express or tacit approval of the association that its agents were warranted in assuming that they might use such means, and that the association and its individual members would approve or tolerate such use, whenever the end sought to be attained might be best attained thereby.

[Ed. Note.—For other cases, see Trade Unions, Dec. Dig. § 4.]

* For former opinions in this case, see (148 Fed. Rep., 824) Vol. 3, p. 41; (208 U. S., 274), vol. 3, p. 324.

^b Syllabus copyrighted, 1911, by West Publishing Company.

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MONOPOLIES (§ 28)—ACTION FOR DAMAGES AGAINST COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—QUESTIONS FOR JURY.—In an action to charge defendants, as members of various local unions of a labor organization, with liability for acts of agents of the organization on the ground of a combination in restraint of interstate commerce in violation of Anti-Trust Act of July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), where there was conflicting testimony as to their knowledge of such acts and other evidence from which inferences must be drawn, the question of liability was for the jury, and it was error to withdraw such question from them and to submit only the question of damages.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 28.]

TRADE UNIONS (§ 9)—ACTION TO CHARGE PRINCIPAL FOR ACTS OF AGENT—EVIDENCE.—In an action to charge members of a labor organization individually with liability because of alleged unlawful acts of agents sent out by the organization, evidence that defendants paid dues to the organization after service of the complaint is not competent either as showing ratification by defendants of the acts of such agents or that such acts were authorized when committed.

[Ed. Note.—For other cases, see *Trade Unions*, Dec. Dig. § 9.]

EVIDENCE (§ 317)—HEARSAY.—In an action by a manufacturer doing an interstate business against members of a labor organization to charge them with liability under Anti-Trust Act of July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), one of the violations of the act charged being that defendants combined to prevent customers of plaintiff in other states from buying his goods by means of threats or boycott, etc. testimony of plaintiff's salesmen that customers told them of such threats, made by persons claiming to represent defendant organization, was incompetent as hearsay.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1174-1200; Dec. Dig. § 317.]

In Error to the Circuit Court of the United States for the District of Connecticut.

Action at law by D. E. Loewe and others against Martin Lawlor and others. Judgment for plaintiffs, and defendants bring error. Reversed.

This cause, an action for damages under the anti-trust act, comes here upon writ of error to review a judgment of the Circuit Court, District of Connecticut, for \$282,240.12 in favor of defendants in error, who were plaintiffs below. The verdict on which this judgment was entered was practically directed by the court, who left to the jury merely the matter of damages, as the "only question with which

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they could properly concern themselves." The jury assessed the damages at \$74,000, which amount the court trebled.

Alton B. Parker, F. L. Mulholland, and John K. Beach, for plaintiffs in error.

Walter G. Merritt and Daniel Davenport, for defendants in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

[524] LACOMBE, Circuit Judge.

1. The complaint is printed in full, and the cause of action thoroughly discussed in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, where the demurrer to the complaint was disposed of. Reference to that opinion sufficiently indicates the issues involved on the trial. The decision also has fixed the law of this case. It is needless to inquire whether boycotts generally, or this particular variety of boycott, are or are not unlawful at common law, or under the statutes of some particular state. If it be shown that individuals have combined together to induce a manufacturer engaged in interstate commerce to conduct his business as they wish, and, upon his refusal, further combine not only to prevent him from manufacturing articles intended for interstate commerce, but also to prevent his vendees in other states from re-selling the articles which they had imported from the state of manufacture or from further negotiating for the purchase and intertransportation of such articles, the combiners intending thereby to destroy or obstruct an existing interstate traffic, such combination of individuals must be held to have essentially obstructed the free flow of commerce between the states. A combination to effect such an obstruction is a violation of the Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); and when such obstruction is shown to have brought about an injury to a person's business, recovery may be had, although the impelling motive of the combination was an effort to better the condition of the combiners, which except for the Anti-Trust Act might be proper and lawful.

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Of the facts, conceded by demurrer, which were relied upon in the former decision, the following are fully proved by competent evidence in the record now before us: Plaintiffs were manufacturers of hats in Danbury, Conn., and had an interstate trade with customers in different states, which was very much the larger percentage of their business. The combination of individuals known as the United Hatters of North America, numbering several thousand members, were combined with other labor unions into another association known as the American Federation of Labor, numbering more than a million members, scattered all over the United States. The United Hatters undertook to unionize the different factories in which their members worked. In some instances the owners thereof at first refused to unionize their factories. Thereupon the United Hatters declared a union war against them and missionaries purporting to represent the combination visited customers of such recalcitrant owners in different states, and told them that unless they ceased to handle such goods, the affiliated unions would refrain from patronizing them. As a result thereof some of those who had at first refused yielded and unionized their factories. Plaintiffs were interviewed by some officers and members of a hatters' union, and after some discussion as to the advantages and disadvantages of unionizing their factory refused to do so. Thereupon a strike was called which took all union men out of plaintiffs' factory. Subsequently missionaries representing themselves as coming on behalf of the United Hatters visited customers of plaintiffs in other states. To some of these customers they stated that [525] unless they would cancel any orders they had given for plaintiffs' goods, and would agree to discontinue buying from plaintiffs in the future, their (the customers') "factories would be tied up and the men called out." To others they stated that if they continued business with plaintiffs they (the missionaries) would "call on their own customers and endeavor to prevent their using their goods"; i. e., the goods offered for sale by the person interviewed. To others they stated that unless they ceased to deal in plaintiffs' goods they "would be boycotted," or "would be put on the unfair list." Some of the customers of plaintiffs who were thus inter-

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viewed ceased to make further purchases of Loewe hats because of statements made to them at these interviews.

The first assignment of error, which challenges attention on this appeal and which is discussed at the outset of defendants' brief, is the action of the trial judge in taking the case from the jury and himself deciding every question except the amount of damages. Defendants contend that in so doing "the trial court assumed the function of a jury in passing upon the credibility of witnesses and weighing conflicting testimony." We think this assignment of error is well taken for these reasons: The defendants are all members of a voluntary association or trade union of journeymen hatters, known as the United Hatters of North America, including more than 9,000 journeymen hatters residing in different states of the United States or in Canada. Defendants are members of various local unions of this association in the state of Connecticut, and each of them has paid dues continuously to his local union for some years prior to September, 1903, the date this suit was commenced. These dues were both local and national—a certain percentage of the member's wages for each purpose. Both had to be paid; as the secretary of the Danbury local expressed it, "we wouldn't accept one if he didn't pay the other." This money has been, in part at least, disbursed in paying the various officers of the local and of the general unions and in paying the various agents or missionaries who have been engaged in carrying out the objects of the association, which included the extension of the union, the increasing of a demand for goods bearing the union label and the so-called unionizing of factories. These objects of course could be promoted by methods entirely lawful and proper, or by methods which were unlawful and improper, or which were of such a character as to constitute a combination in restraint of interstate trade within the meaning of the Anti-Trust Act. In 1896 the United Hatters of North America affiliated with the American Federation of Labor, its officers on its behalf pledging its members individually and collectively to be governed by the constitution, rules and usages of the federation. Since then delegates to the conventions of the federation have been elected by a referendum

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vote of the United Hatters pursuant to the Hatters' constitution, and also a delegate from the Connecticut State Federation with which all the local unions to which defendants belong were affiliated. Many of the defendants and of other members of the United Hatters have supported the activities [526] of the United Hatters and contributed to the support of the American Federation of Labor.

2. It has been argued here that the mere fact that any individual defendant was a member of and contributed money to the treasury of the United Hatters' Association made him the principal of any and all agents who might be employed by its officers in carrying out the objects of the association, and responsible as principal if such agents used illegal methods or caused illegal methods to be used in undertaking to carry out those objects. We cannot assent to this proposition. The clause of the constitution of the United Hatters which provides that certain of its officers "shall use all the means in their power to bring such shops (i. e., non-union shops) into the trade" does not necessarily imply that these officers shall use other than lawful means to accomplish such object. Surely the fact that an individual joins an association having such a clause in its constitution cannot be taken as expressing assent by him to the perpetration of arson or murder. Something more must be shown, as, for instance, that with the knowledge of the members unlawful means had been so frequently used with the express or tacit approval of the association, that its agents were warranted in assuming that they might use such unlawful means in the future, that the association and its individual members would approve or tolerate such use whenever the end sought to be obtained might be best obtained thereby.

3. Plaintiffs, however, did not rest their case on this bald proposition of membership and payment of dues. There is a mass of testimony in the case covering a history of the activities of the United Hatters and of the American Federation and of their various officers, agents, and missionaries for a series of years, tending to show what methods had been employed, what the various organizations thought of such methods, and what it might be expected by any man of the

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most ordinary intelligence would be done whenever officers and missionaries undertook to unionize any particular factory. Literature, published by the associations and laid before their members in issues sufficient to enable every one to familiarize himself with what was going on, was put in evidence. On the other hand, most of the defendants—175 of them—testified, either on the stand or under stipulation between counsel, that they had never held office in any local or national union and were never delegates to any convention; that they had no information of any trouble in the Loewe factory until after the men were called; that they were not regular readers of the *Hatter's Journal*, and did not remember reading anything therein about the factories that were unionized before the Loewe campaign opened; that they had no knowledge of the methods which were employed to constrain manufacturers to unionize their shops. With this evidence in there was a conflict of testimony as to a vital issue in the case. The other testimony was of such a character and there was such a mass of it—minutes, resolutions, reports, proclamations, printed discussions, etc.—that the jury might have discredited defendants' protestations of ignorance, but, since they had made such protestations [527] under oath, they were entitled to have the question of their credibility determined, not by the court, but by the jury.

Some of the defendants were officers of local unions; some of them did not testify, but in the various chains of proof which were relied upon to establish the relation of principal and agent between local unions in Connecticut and individuals, not members of these local unions, who announced themselves as missionaries of union hatters in distant states, there are some links which are proved not directly but as inferences from established facts. Different inferences were at least possible, and in a case of this sort, where conspiracy to do an unlawful act is charged, it should be left to the jury to say which inference shall be drawn. Moreover, it was for the jury to determine from the entire body of proof what was the intent of the individuals who made up the combination or what they must have known were the necessary and inevitable consequences of their acts.

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4. Since there is to be a new trial it is desirable that the opinion of this court should be expressed on two questions as to the admissibility of evidence, which will probably arise again. The court admitted evidence of the payment of their dues to the unions by defendants, after complaint was served. This was not competent as showing ratification, and, as we understand their brief, plaintiffs do not so contend. It was offered as "tending to show that the acts (of the missionaries) were authorized at the time they were performed previous to the suit," upon the theory that otherwise the disclosures made to an individual defendant by his reading of the complaint would have brought forth protest and disapproval on his part. We think it should have been excluded.

5. A salesman of plaintiffs testified that he called at various times on several different customers, giving their names. In some instances he was allowed to state that the customer told him that at some prior time he had been interviewed by some labor representative who told him that unless he ceased to handle plaintiffs' goods he would get into trouble with the union. This was hearsay, the narrative of a past transaction given by an outside party, not under oath. It was not competent to prove that threats had been made by some one purporting to represent defendants. Its admission is sought to be sustained upon the authority of cases, which hold that it is proper to show as part of the *res gestæ* what reason was given by a person as an excuse for discontinuing some former practice. Wigmore on Evidence, § 1729, and cases cited. This exception to the general rule should not be extended as far as it was in some of the instances testified to.

The judgment is reversed.

PETITION FOR REHEARING.

While we fully appreciate the inconvenience which will result from proceeding with a new trial of the cause before the rulings of this court as to the law of the case shall have been reviewed by the Supreme Court, we are not disposed to reverse those rulings and decide this appeal contrary to our convictions in order to facilitate the pres[528]entation

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of the questions arising upon the appeal to the court of last resort. Nor does there seem to be any way to accomplish a like result by ordering a re-argument and undertaking to certify specific questions; the record is too voluminous and the questions would be too numerous, and upon those questions we are not divided in opinion.

There is nothing in the petition to induce a change in the opinion already expressed by this court; all that there is in the petition may be found in the original argument. Counsel seems to have misapprehended what is said in the opinion about knowledge by defendants of the acts done. It has not been decided that it is essential for plaintiffs to prove that any defendant had knowledge of all or any of the specific acts done in the campaign against D. Loewe & Co. On the contrary, it is expressly pointed out that the language of the constitution of the association might be supplemented by proof that, in carrying out its objects, "unlawful means had been so frequently used with the express or tacit approval of the association that its agents were warranted in assuming that they might use such unlawful means in the future, that the association and its individual members would approve or tolerate such use whenever the end sought to be obtained might be best obtained thereby." And in the very next paragraph reference is made to literature of the association and of the federation—minutes, resolutions, reports, proclamations, printed discussions, etc.—from which the jury might draw conclusions as to what any man of ordinary intelligence would expect might be done by these bodies or by their agents whenever occasion for action might arise.

Counsel is also mistaken in assuming that the court "overlooked the significant fact that the American Federation of Labor had a constitution providing for boycotting." We did not overlook this fact, nor the further fact that the federation did not as a body declare any boycott against plaintiffs' firm. Since we did not indicate that there was error in admitting proof of the constitution of the federation, or of its action in conventions, or in committee or of its published literature, or of what it or its local branches did in connection with Berg, Roelofs or Loewe, or any one else, it

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might fairly be assumed that we considered that all these were proper matters for the consideration of the jury. We did intend to hold, however, and this petition has not modified our opinion, that plaintiffs cannot make out a case entitling them to the direction of a verdict in their favor by showing (1) that A. B. was a paying member of the United Hatters' Association; (2) that the Hatters' Association was affiliated with the American Federation of Labor and governed by its constitution, rules, and usages; (3) that the constitution of the federation contains the following: "It shall be the duty of executive council to secure the unification of all labor organizations so far as to assist each other in any justifiable boycott and with voluntary financial help in the event of a strike or lockout, when duly approved by the executive council." A boycott directed solely against the transfer of goods from a manufactory to purchasers or consignees within the same state might be a "justifiable boycott" so far as the Anti-Trust Act is concerned, and this action can be maintained only for a violation of that statute; (4) [529] that on several occasions a person representing himself to be a missionary of the Hatters' Association called on dealers in other states who were importing Loewe's hats from Connecticut, and told them that unless they ceased doing so the missionary would call on their customers and endeavor to prevent their using their goods. What conclusion, touching each defendant, should be drawn from these facts in connection with the rest of the proof is a question for the jury to pass upon.

It may be well, however, that we should indicate for the guidance of the Circuit Court in the new trial that, as we understand the decision of the Supreme Court in this case, there may be a distinction drawn between (a) a combination to cause a strike in a manufactory located in a particular state, where the immediate object is the unionizing of that factory, although a part of its product, if manufactured, would have become the subject of interstate trade, and (b) a combination directly to restrain and put a stop to the importation by a person in one state of goods produced at a manufactory in another state, although the ultimate result

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sought to be obtained by such restraint might be merely the changing of conditions in that particular manufactory.

It is suggested in the petition for rehearing that "the question of entering judgment against part of the defendants was not considered in the opinion." It was not discussed in the opinion because it did not appear in the record or in plaintiff's brief that it was contended that there should be any differentiation between the different defendants—all sued for a joint conspiracy. On the contrary, the whole argument was directed to the proposition that all were responsible for all the acts complained of. Nor is there even now any offer made to submit to a dismissal as to all except the very few who as plaintiffs express it "took active part in the conspiracy."

The petition for rehearing is denied.

[664] UNITED STATES *v.* PATTEN ET AL.*

(Circuit Court, S. D. New York. March 23, 1911.)

[187 Fed. Rep., 664.]

MONOPOLIES (§ 31) — ANTI-TRUST ACT — VIOLATION — INDICTMENT — OVERT ACTS—"CONSPIRACY."—Congress, by federal Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 28 Stat. 209 (U. S. Comp. St. 1901, p. 3200), having employed the words "conspiracy" and "conspire" without words of limitation in creating offenses affecting interstate commerce, did not provide as in the general conspiracy statute (Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676]) that overt acts shall be necessary to complete the offense, and hence counts in an indictment for conspiracy to monopolize interstate trade and commerce in violation of the anti-trust law were not demurrable for failure to allege overt acts since the unlawful agreement, and not the overt acts, constitutes the crime of conspiracy at common law.^b

[Ed Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7618.]

* Argued and submitted in the Supreme Court and awaiting decision.

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INDICTMENT AND INFORMATION (§ 63)—ALLEGATIONS—CONCLUSIONS
"CALCULATED."—An allegation that a conspiracy is "calculated" to produce a certain result is an allegation of a mere conclusion, and ineffective.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 185; Dec. Dig. § 63.]

For other definitions, see Words and Phrases, vol. 1, pp. 942, 943.]

MONOPOLIES (§ 12)—COMBINATIONS—"CORNER."—A "corner" is the securing of such control of the immediate supply of any product as to enable those operating the corner to arbitrarily advance the price of the product. It is ordinarily created by operations on boards of trade or stock exchanges, and by dealings in options and futures.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, vol. 2, p. 1600.]

MONOPOLIES (§ 12)—CORNERS—PUBLIC POLICY.—While a corner is illegal because it is a combination which arbitrarily controls the prices of a commodity, it cannot be called a combination in restraint of competition since the going up of the price incident to the creation of a corner necessarily increases competition.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 31)—RESTRAINT OF TRADE—RUNNING A CORNER—INTERSTATE COMMERCE.—Since the operation of a scheme to corner the cotton market and thereby raise the price of cotton for the purpose of compelling a settlement by short speculators at an abnormally high price does not directly affect or restrain interstate commerce, there being no direct relation between prices and such commerce, an indictment alleging a conspiracy to run a cotton corner without any alleged intent to obstruct interstate commerce did not charge a violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 28 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

[685] MONOPOLIES (§ 12)—INTERSTATE COMMERCE—OBSTRUCTION.—Any combination which interferes with the right of a manufacturer to purchase a commodity moving in interstate commerce, at prices determined by the competitive law of normal market conditions, does not necessarily constitute a direct restraint on interstate commerce in violation of the federal Anti-Trust Act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—INTERSTATE COMMERCE—RESTRAINT—ANTI-TRUST ACT—"MONOPOLIZE."—Trade and commerce are monopolized, within

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Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting the same, when, as a result of efforts to that end, a few persons acting together obtain power to control the price of a commodity moving in interstate commerce, though such power is not exercised, its existence being sufficient.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

For other definitions, see Words and Phrases, vol. 5, pp. 4570-4574.]

MONOPOLIES (§ 12)—CONSPIRACY TO RESTRAIN COMMERCE—INDIVIDUAL ACTS.—An indictment against operators of a cotton corner for alleged violation of the Sherman Anti-Trust Law charged that defendants had conspired to monopolize a part of the trade and commerce among the several states by becoming members of and engaging in an unlawful combination in the form of an agreement by which they were severally to purchase cotton to such an extent that, together, they would have enough to enable them to control the price of such cotton, and severally to demand arbitrary, excessive, and monopolistic prices for the same on the sale thereof by them respectively to spinners and manufacturers other than such conspirators. *Held* that, since no monopoly exists when individuals, each acting for himself, own large quantities of a commodity, the indictment was fatally defective as alleging only a scheme to demand monopolistic prices as the result of individual as distinguished from collective power.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 31)—CONSPIRACY—INDICTMENT.—Since a conspiracy to monopolize is a conspiracy to create a monopoly, an indictment for conspiracy to monopolize interstate trade and commerce in cotton in violation of the Sherman Anti-Trust Law, was insufficient where it failed to show that the conspiracy, if successfully carried out, would have resulted in a monopoly.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 31.]

INDICTMENT AND INFORMATION (§ 125)—DUPLICITY.—An indictment consisting of several counts was not duplicitous because of reference therein to other counts charging different offenses, only to give details of the offense charged in the counts objected to.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.]

James A. Patten and others were indicted for alleged violation of the Sherman Anti-Trust Law in the running of a corner in cotton. On demurrer to indictment. Sustained in part.

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[666] *Spoooner and Cotton*, for defendants Brown, Hayne, and Scales.

George P. Merrick and *Henry Wollman*, for defendant Patten.

Henry A. Wise, U. S. Atty. (*Felix Frankfurter*, *Clark McKercher*, and *Oliver E. Pagan*, of counsel).

NOYES, Circuit Judge.

This is an indictment in eight counts charging violations of sections 1 and 2 of the federal anti-trust statute. The first four counts charge conspiracies to monopolize interstate trade and commerce; the second and fourth containing no averments of overt acts. The fifth count charges a combination, and the sixth a contract in restraint of such trade and commerce. The seventh and eighth counts charge conspiracies by the method of "running a corner"; the seventh count alone containing allegations of overt acts. The principal questions raised by the demurrers and motions, and with respect to which the sufficiency of different counts may be tested, are as follows: (1) Are the counts sufficient which contain no averments of overt acts? (2) Do the so-called "corner counts" charge a violation of the statute? (3) Does the third count—the "power" count—state a conspiracy to monopolize in violation of the statute? (4) Are the fifth and sixth counts invalid for duplicity?

1. With respect to the first question, it is conceded that at common law the unlawful agreement constituted the crime of conspiracy and that it was unnecessary to allege or prove any act done in furtherance of it. In many of the states the rule of the common law has been changed by statute and the parties to the unlawful agreement are afforded a locus poenitentiae. They must do an act to effect the object of the agreement before the offense of conspiracy is complete. This change in the common law is not confined to state statutes. The general conspiracy statute of the United States (Rev. Stat. § 5440, U. S. Comp. St. 1901, p. 3676; also section 37, c. 321 of the Laws of 1909 [Act March 4, 1909, c. 321, § 37,

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35 Stat. 1906, U. S. Comp. St. Supp. 1909, p. 1402]) provides that "if two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy" each of the conspirators shall be punished.

But unless and until the common-law rule is changed by statute it is clear that when in either a state or a national enactment the offense of conspiracy, either general or specific, is created, the incidents of the offense at common law go with it. The term "conspiracy" has a well-defined common-law meaning. Congress in using it might attach limitations and qualifications, but if it fails to do so the common-law definition governs. That which completes the common-law offense completes the statutory offense. "Congress may as well define by using a term of a known and determinate meaning as by an express enumeration of all the particulars included in that term." *United States v. Smith, & Wheat*. 153, 159, 5 L. Ed. 57.

In the first and second sections of the federal anti-trust statute Congress employed, without words of limitation, the terms "conspiracy" and "conspire" in creating offenses affecting interstate commerce. [667] It did not provide, as in the general conspiracy statute, that overt acts should be necessary to complete the offenses. It used without qualification terms having well-known and determinate meanings, and qualifications cannot be added by construction. The Anti-Trust Act is independent of the earlier conspiracy enactment, and the latter does not purport to be a statute of definition. While the offenses which it is directed against require overt acts, there is no warrant for reading its limitations into this separate, distinct and complete enactment. Consequently I reach the conclusion that the counts containing no averments of overt acts are not for that reason insufficient, and cannot but regard such conclusion as supported by the weight of authority. *United States v. Kissel* (C. C.) 173 Fed. 823; *United States v. Patterson* (C. C.) 55 Fed. 605. See, also, *United States v. MacAndrews & Forbes Co.* (C. C.) 149 Fed. 823; cf. *United States v. Reichert* (C. C.) 82 Fed. 142.

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The second question is whether the so-called "corner counts"—the seventh and eighth—state acts constituting violations of the anti-trust statute. These counts are alike with the exception of the statement of overt acts, and each may be, broadly speaking, divided into three parts, which may be thus summarized:

1. The charging part contains a general charge of conspiracy in restraint of interstate commerce, with the usual formal and jurisdictional averments.

2. The second part contains a "description of the trade and commerce to be restrained." Under this head it is stated, in substance, that cotton is an article of necessity raised in the Southern states, which moves in large volume in interstate and foreign commerce, and that it is bought and sold upon the New York Cotton Exchange to such an extent as to practically regulate prices elsewhere in the country, so that future sales by speculators upon such exchange of more than the amount of cotton available at the time of delivery would create an abnormal demand and resultant excessive prices in all cotton markets.

3. The third part contains a "description of the method devised and adopted by the conspirators for restraining the trade and commerce." It is alleged, at the outset, that the conspirators were to restrain trade and commerce by doing "what is commonly called running a corner in cotton." Averments then follow showing how the corner was to be brought about and its effect, which may be thus analyzed:

1. The conspirators were to make purchases from speculators upon the New York Cotton Exchange of quantities of cotton for future delivery greatly in excess of the amount available for delivery when deliveries should become due.

2. By these means an abnormal demand was to be created on the part of such sellers who would pay excessive prices to obtain cotton for delivery upon their contracts.

3. The excessive prices prevailing upon the New York Exchange would cause similar prices to exist upon other cotton markets.

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[668] 4. "As a necessary and unavoidable result of their acts, said conspirators were to compel" cotton manufacturers throughout the country to pay said excessive prices to obtain cotton for their needs or else curtail their operations.

5. And also, as "a necessary and unavoidable result" of said acts, an unlawful obstruction would be put upon interstate trade and commerce.

The offense charged, then, is a conspiracy in restraint of trade through the operation of a "corner," so that it is desirable, in the first place, to briefly examine the law governing that kind of combination.

It is also averred that the alleged unlawful conspiracy was "one calculated unlawfully to obstruct said interstate trade and commerce in such a manner as necessarily to cause the closing of some and the partial closing of many other cotton mills in the United States and elsewhere."

2. An allegation that a conspiracy is one "calculated" to produce a certain result is not an allegation of fact. It must be treated as a conclusion drawn by the pleader, and, consequently, these allegations cannot be regarded as adding anything to the allegations analyzed in the text.

3. The term "corner" is thus defined and described in Eddy on Combinations (vol. 1, §§ 72, 73):

"Broadly defined, a 'corner' is the securing of such control of the immediate supply of any product as to enable those operating the 'corner' to arbitrarily advance the price of the product. * * * Ordinarily a 'corner' is created by operations upon boards of trade or stock exchanges, and by dealings in 'options' and 'futures.'"

It is manifest, however, that securing control of the supply of a commodity with power to advance prices might afford the person operating a corner little or no profit unless an accompanying artificial demand could be created. This is effected, as is illustrated in the analysis of the corner in question, by purchases of futures from "short" sellers. Men who have nothing to deliver sell and agree to deliver upon a certain day that which they have to go into the market and buy. If the immediate supply is controlled they can only obtain what they require by bidding up prices, and, in the end, if the corner be successful, paying whatever its operators may dictate.

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4. Corners are illegal. They are combinations contrary to public policy, and all contracts and undertakings in support thereof are void. 1 Eddy on Combinations, § 81; Greenhood on Pub. Pol. p. 642, and cases cited in both treatises. But while a corner is illegal because it is a combination which arbitrarily controls the prices of a commodity, it cannot, strictly speaking, be called a combination in restraint of competition. On the contrary, the bidding up of the prices incident to the creation of a corner necessarily increases competition. Activity in trade, temporarily at least, follows increased demand. Everything tends to stimulate competition, although abnormally and feverishly. A corner is altogether wrong, both from a legal and an economical standpoint, but it would seem to be condemned by other principles [669] of public policy than those particularly relating to combinations in restraint of competition.

It is clear, upon the foregoing principles, that the combination described in these counts is negatively illegal without any prohibitory statute and would be positively unlawful in any state having a statute against corners. But upon equally well-settled principles it is manifest that the combination is not in violation of the federal anti-trust statute unless it obstructs the current of interstate commerce. Obviously this combination does not belong to that class of combinations in which the members are engaged in interstate commerce and enter into an agreement in restraint of competition. As just pointed out, it is more than doubtful whether a combination to run a corner restrains competition at all.*

* It is urged in the government's brief that it is immaterial that, from an economic standpoint, a corner may stimulate and not restrain trade. It is said that the determination whether a combination is a conspiracy in restraint of trade is not to be made from an economic point of view, but must be considered altogether from a legal standpoint, and the decision of the Circuit Court of Appeals for this circuit in *Pennsylvania Sugar Refining Co. v. Am. Sugar Refining Co.*, 166 Fed. 254, 256, 93 C. C. A. 313, is quoted to the effect that a conspiracy may be in restraint of trade, although such a conspiracy "may actually develop and increase trade." But in that case the court was speaking of acts and agreements in restraint of competition and it was pointed out that, as the law regards competition as the life of trade, anything which restrains competition must, from the legal

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And if competition be affected, still none of these conspirators—so far as appears—does an interstate business. It is therefore unnecessary to examine the many cases cited from the Supreme Court and other federal tribunals where what may be termed “voluntary” restraints of trade have been created; i. e., where persons engaged in interstate trade have entered into combinations affecting it. The combination in question, if it be in violation of the statute, is so because it is an “involuntary” restraint of trade; i. e., it is a conspiracy entered into by persons not engaged in interstate commerce, which has the effect of preventing other persons from freely engaging in it.

The principal case relating to a conspiracy upon the part of outsiders to place obstructions in the way of the carrying on of interstate trade in violation of the anti-trust statute is *Loewe v. Lawlor*, 208 U. S. 274, 300, 28 Sup. Ct. 301, 309, 52 L. Ed. 488. That case was presented upon a demurrer to a complaint which averred “that there [670] was an existing traffic between plaintiffs and citizens of other states, and that for the direct purpose of destroying such interstate traffic defendants combined” to prevent all interstate transportation of the goods manufactured by the plaintiff. The Supreme Court held that the complaint was sufficient and that the alleged combination was in direct restraint of interstate trade. *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 92 C. C. A. 318, already referred

standpoint, necessarily restrain trade, although actual conditions of business might be such that the opposite result would be likely to follow. Thus a conspiracy upon the part of persons interested in one manufactory to obtain control of a competing company and put it out of business would be in restraint of trade, although it might be shown that with competition eliminated the volume of business would be increased. The decision referred to, however, affords no support for the proposition that when the conspiracy under consideration is one among outsiders, and is only unlawful because it places obstructions in the way of trade and commerce, it is immaterial that it may actually place no obstructions therein. In such a case there is no difference between the economical and the legal standpoint. Unless a conspiracy of such a nature actually affect the volume of trade, or the freedom with which it may be carried on, a restraint upon trade cannot be said to be imposed.

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to, is a case somewhat different in its nature from *Loewe v. Lawlor*. In that case it was averred that a conspiracy was formed in the interest of one manufacturing company to obtain control of a competing corporation for the purpose of preventing it from engaging in business, and it was held that "a conspiracy to prevent the manufacturer who procures his supplies and disposes of his products by means of interstate commerce from engaging in business at all necessarily places restraints upon such commerce." The element of the elimination of competition was present in the *Pennsylvania Company case* and was not present in the *Loewe case*, but this does not alter the fact that the decision in each case was distinctly that the combination in question directly restrained interstate commerce because its object and purpose were to prevent manufacturers having interstate business from continuing to carry it on.

5. Bearing the principle of these cases in mind, let us consider the fundamental question whether the conspiracy to "run a corner" described in the indictment directly restrained interstate commerce. No other restraint—as is well settled by numerous authorities—would contravene the act.

Now there are no allegations in the present indictment, as there were in the *Loewe* and *Pennsylvania cases*, that the purpose of the conspiracy was to restrain interstate commerce. No intent to obstruct such commerce is averred. But it is said by the government that the parties to a conspiracy are presumed to intend the necessary and inevitable consequences of their acts. Assuming that this is so and that it is unnecessary to allege any specific intent in charging an offense under this statute, we must turn to see what the indictment says are the "necessary and unavoidable results" of the acts of the conspirators in "running a corner in cotton." And in making such examination we must also assume that the allegations of the results to follow the conspiracy are more than the conclusions or economic theories of the pleader, and amount to allegations of fact. But we must likewise bear in mind that the indictment does not specifically allege that the conspiracy directly obstructed interstate commerce. The necessary and unavoidable result of the acts stated might be an obstruction to interstate commerce without it following

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that the effect upon such commerce would be direct. The indirect consequences of acts may be as unavoidable as the direct results. Consequently, while I will accept as allegations of fact the averments of the indictment concerning the necessary and unavoidable results of the acts of the conspirators, I cannot consider such averments as precluding examination into the question whether it appears that the direct, as distinguished from the [671] indirect, incidental, or remote, effect of the alleged conspiracy was to restrain or obstruct interstate commerce.

Manifestly the result which the conspirators aimed at was to compel speculators short of cotton to settle at abnormally high prices; a process sometimes called "squeezing the shorts." Manifestly, also, the raising of prices in other cotton markets than the New York Cotton Exchange was in itself no part of the scheme of the conspirators. Still, prices of cotton are so correlated that it may be said that the direct result of the acts of the conspirators was to be the raising of the price of cotton throughout the country. But it does not follow, in my opinion, that because exceedingly high prices of cotton were to be brought about interstate commerce was to be directly affected and obstructed. On the contrary, it seems clear that any effect upon interstate commerce in the way of curtailing shipments or otherwise would have been merely incidental to the high prices.

6. The broad contention of the government is that any combination which interferes with the right of the manufacturer to purchase a commodity moving in interstate commerce at prices determined by the competitive law of normal market conditions directly restrains interstate commerce and violates the federal anti-trust statute. I cannot assent to this proposition. There is no direct relation between prices and interstate commerce. The volume of shipments does not necessarily depend upon the lowness of prices. Innumerable other factors enter into the problem. The continuation of normal market conditions might or might not curtail interstate commerce. But if it were curtailed by upset market conditions that which produced such result would still only indirectly affect such commerce.

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Let us test the strength of the government's contentions in the application. A general strike among employees in cotton mills might cause manufacturers "wholly to close and cease to operate their several factories." As a result interstate shipments of cotton would be curtailed, but such a combination would fall far short of that denounced in *Loewe v. Lawlor, supra*. A conspiracy among "night riders" to burn tobacco warehouses might, if carried out, increase prices and would almost "unavoidably and necessarily" diminish the volume of possible interstate shipments. Still such a conspiracy would be left to the states for punishment. The direct result would be injury to the warehouse owners. The effect upon interstate commerce would be incidental and indirect. A conspiracy might be formed to injure the credit of persons engaged in mercantile business which might be so extensive as to cause failures and a consequent material diminution in the volume of interstate shipments. But the direct effect of the conspiracy would be the injury to the merchants, and the effect upon interstate commerce would be altogether remote. Many other illustrations might be given. These, however, are sufficient, in my opinion, to demonstrate the unsoundness of the government's contention. For these reasons, I reach the conclusion that the so-called "corner counts" fail to show any direct effect upon interstate commerce, and consequently fail to charge violations of the statute.

[672] The next question is whether the third count charges a violation of the statute. The offense charged in this count is a conspiracy "to monopolize by the method in this count of this indictment hereafter set forth a part of the trade and commerce among the several states," and the material averments with respect to such method are as follows:

"Said conspirators were to become members of and engaged in an unlawful combination in the form of an agreement, under which they were * * * severally to purchase * * * cotton * * * so much that together they would * * * have enough * * * cotton * * * to enable them * * * to control the price of such cotton, and severally to demand arbitrary, excessive and monopolistic prices for the same upon the sale thereof by them respectively to spinners and manufacturers other than said conspirators. * * *

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This count is spoken of in the briefs as the power count, and it is claimed by the government to charge a conspiracy to monopolize by acquiring enough cotton to give power to fix arbitrary and excessive prices.

7. It is undoubtedly true, under the law as it stands, that trade and commerce are "monopolized" within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient.

8. As just indicated, however, the power of control amounting to a monopoly must be held by persons acting in concert. No monopoly exists when individuals, each acting for himself, own large quantities of a commodity. Under such conditions none of the evils of monopoly is present. The inherent and collateral power incident to concerted action is absent. It is true that the individuals might unite and create a monopoly, but they might not, and until they do there is no monopoly.

9. A conspiracy to monopolize is a conspiracy to create a monopoly, and unless it appears from the indictment that the conspiracy in question, if successfully carried out, would have resulted in a monopoly, no violation of the federal statute is charged. And here is where the allegations are lacking. Construing them fairly, it cannot be said that it is averred that these defendants, as the result of this conspiracy, were to have anything more or other than individual power to demand monopolistic prices. It is alleged that purchases of cotton were to be made "severally" of such amounts that the defendants could "severally" demand arbitrary and excessive prices upon the sale thereof by them "respectively." I cannot find any clear allegations of collective power. The power to control prices which this conspiracy was to put into the hands of the defendants was several and not joint—a power over individual, and not over aggregate, possessions—and if they had obtained it they would not have obtained a monopoly. The offense charged is not a conspiracy to create a monopoly, but a conspiracy to give persons power to create

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one if they should desire to do so and should enter into a further agreement to [678] that end. And while it was not necessary, in my opinion, under the law as it now stands, to allege that the defendants exercised the power to control prices, it was necessary to state some agreement among them that they would act together should there be occasion for so doing.

The federal Anti-Trust statute is a powerful instrument for the protection of the people from combinations and monopolies. But it is a stringent statute which is carried far when it is used as the basis of a criminal prosecution of persons for conspiring to monopolize by obtaining power over prices without charging any intention to exercise such power by fixing prices. And when such a prosecution is had, a court is not drawing refined distinctions nor insisting upon technicalities when it requires the indictment to charge clearly and unmistakably that the object of the conspiracy was to put such power of monopoly into the hands of the defendants acting collectively and not each for himself. Doubt as to the meaning of the indictment in such a case should be resolved against the government.

10. The final question to which it is necessary to give any extended consideration is whether the fifth and sixth counts are subject to the objection of duplicity because they each charge the commission of two substantive offenses. The defendants contend that the fifth count charges a combination in restraint of trade, and then bring in by reference all the material allegations of the first count, which charges a conspiracy in restraint of trade, and therefore it is urged that there is a misjoinder of two crimes in one count. Similar contentions are made with respect to the sixth count. In my opinion the contentions of the defendants are not well founded. Referring to the charging part of each count it will be found that only a single offense is charged against the defendants and the references in other parts of the counts are only for the purpose of giving details of the offenses charged.

The grounds of the demurrers and motions to quash which have not been already noticed seem not to require discussion.

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The demurrers, so far as directed against the third, fourth, seventh, and eighth counts of the indictment are sustained, and in other respects are overruled. The motions to quash are denied.

[92] UNITED STATES *v.* SWIFT ET AL. (three cases).^{*}

(District Court, N. D. Illinois, E. D. May 12, 1911.)

[188 Fed. Rep., 92.]

COURTS (§ 91)—PREVIOUS DECISIONS—SHERMAN ANTI-TRUST ACT—VALIDITY OF CRIMINAL PROVISIONS.—Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is primarily a criminal statute, prohibiting certain acts as unlawful restraints and monopolies of interstate trade and commerce and prescribing the punishment therefor, the jurisdiction conferred on Circuit Courts as courts of equity by section 4 to "prevent and restrain violations of this act" being made dependent on the preceding criminal sections and confined to preventing the carrying out of that which is declared in the prior sections to be criminal. Therefore every decision of the courts sustaining an injunction granted under such section has necessarily determined that the preceding sections are valid, and that the things enjoined were crimes, and in view of the numerous decisions of the Supreme Court upholding such injunctions the validity of the criminal sections is no longer open to question in the inferior courts.^b

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 325; Dec. Dig. § 91.]

INDICTMENT AND INFORMATION (§ 125)—DUPLICITY—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE.—An indictment charging a combination in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is not bad for duplicity because it charges and enumerates different means adopted or different things done to accomplish the object of the combination.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 350-371; Dec. Dig. § 125.]

MONOPOLIES (§ 31)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE—CRIMINAL PROSECUTIONS—INDICTMENT.—An indictment for a combination in restraint of interstate commerce in violation of

^{*} For opinion on the pleas of immunity (188 Fed. Rep., 1002), see, *ante*, p. 53.

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Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), between defendants as representatives of three different packing concerns, which charges that each concern was represented by certain individuals, each one of whom was authorized to act for the others of his "group" and that the word "group" as used therein is intended to apply to any or all of the members of the particular group, is sufficiently specific where it charges that acts were done by a particular group without averring that each particular member of such group individually took part therein.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 81.]

[93] **MONOPOLIES (§ 31)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.**—An indictment for a combination in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which charges that defendants were officers of certain corporations which they managed and controlled, directing the corporate action, and that the groups of defendants representing the several corporations combined together to do the illegal acts, sufficiently charges defendants as individuals.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 81.]

MONOPOLIES (§ 31)—VIOLATION OF ANTI-TRUST ACT—INDICTMENT.—An indictment which charges acts constituting a contract, combination, or conspiracy in restraint of interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is good whether such acts are alleged to constitute a contract, combination or conspiracy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 81.]

INDICTMENT AND INFORMATION (§ 59)—REQUISITES AND SUFFICIENCY OF ACCUSATION.—An indictment is sufficient when it contains a substantial accusation of crime and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution for the same offense, and when from it the court can determine that the facts charged are sufficient in law to support a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 180; Dec. Dig. § 59.]

MONOPOLIES (§ 31)—ANTI-TRUST ACT—OFFENSES.—An indictment alleging facts which show that defendants control three extensive packing concerns doing an interstate business and controlling the larger part of the business in the states in which they operate; that they have combined together in a plan to eliminate competition between such concerns by an agreement not to bid against each other

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for live stock, but to bid exactly the same amounts for like grades, and by fixing a uniform selling price to be charged by each, and apportioning among themselves the total business done according to the financial interest of each—charges a contract combination or conspiracy in restraint of interstate commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. § 81.]

Proceedings by indictments against Louis F. Swift and others. On demurrers to indictments. Overruled.

See, also, 186 Fed. 1002.

Geo. W. Wickersham, Atty. Gen., Edwin W. Sims, U. S. Atty., Wm. S. Kenyon, James H. Wilkerson, Pierce Butler, James M. Sheean, Oliver E. Pagan, Elwood G. Godman, and Barton Corneau, for the United States.

John S. Miller, Moritz Rosenthal, Levy Mayer, George T. Buckingham, M. W. Borders, Albert Veeder, Henry Veeder, Alfred R. Urion, and Ralph Crews, for defendants.

CARPENTER, District Judge.

First I will dispose of the contention that the provisions of the Sherman Act (Act July 2, 1890, c. 647, [94] 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200] are “too indefinite and uncertain in defining the elements or constituents of the crime to justify the indictments, and punishment thereunder by imprisonment or fine.”

1. In this connection I may say that great skill and ability have been exhibited by the counsel for the defendants in analyzing the various decisions of the Supreme Court of the United States which have passed upon the Sherman Act. In the view which I take of those decisions, it will not be necessary for me to determine whether the Congress of the United States meant exactly what it said in passing that act, or whether its meaning was to depend upon judicial construction. If the matter had come to me as an original proposition, I would be obliged to say, having due regard to the three independent branches of our government, that the sole

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power to make the law rested with the legislative branch, and that the sole power of the courts, being satisfied that the legislative body had not exceeded its constitutional authority, was to interpret and enforce the law as made; that the power of the courts is to interpret, rather than to create, a law. This statute defines the acts declared to be unlawful in simple English. The purpose of the act, when ascertained from the language used, is as clear as may be. The legislative purpose inspiring its passage is interesting as a matter of history, but in the absence of ambiguity or uncertainty in the words or phrases used, is, legally speaking, at least unimportant. Canons of construction and means used commonly by the courts to determine legislative intent serve only to confuse when that intent is clearly expressed. Rules of construction serve no good purpose when there is nothing to construe. Courts ought not to interpret that which has no need of interpretation, and, when the words of a statute have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose either of limiting or extending their operation. *Beardstown v. Virginia*, 76 Ill. 40. Courts are not concerned with the advisability of legislation, viewed either from a political or economical standpoint; and it would seem unnecessary to observe that, acting within the limits of the Constitution, the Congress of the United States is supreme and independent. Its enactments represent the law until they are repealed.

However that may be, the statute now under consideration has been the subject of decision for 20 years. The Supreme Court of the United States many times has sustained decrees which restrained violations of it. The individual justices of that court have differed, not on the constitutional power of Congress to pass a penal statute relating to interstate commerce, but as to whether or not a given case has come within its condemnation. In four cases at least a decree or judgment based upon that statute was sustained by that court, and without dissent. *Montague v. Lowry*, 193 U. S. 88, 94

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Sup. Ct. 307, 48 L. Ed. 608; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 [95] L. Ed. 488; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

The Sherman Act is entitled "An act to protect trade and commerce against unlawful restraints and monopolies." It is essentially a penal statute. Sections 1, 2, and 3 declare what is illegal, and provide for punishment in case of violation. Section 4 declares that:

"The several Circuit Courts of the United States are invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

Section 7 provides:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue in any Circuit Court of the United States * * * and shall recover threefold damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Congress aimed effectually to prevent restraint of trade in interstate commerce. It had constitutional power to accomplish this purpose by making restraints of trade criminal acts; or, without making them criminal, by empowering the United States, as complainant, to secure injunctions against acts which constitute restraints of trade, or by doing both. By passing the Sherman Act it did both. The result could have been accomplished in several ways. Congress could have enacted two separate statutes, the one providing that acts done in restraint of trade should be criminal and punished as such; the other providing that the condemned acts should, on the application of the government, be enjoined in the civil courts. It could have passed one statute instead of two, and provided in one section that the various acts in restraint of trade should be criminal, and punished, and in the second section have declared that the same acts in restraint of trade could, on the application of the government, be enjoined.

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If it had passed two separate statutes, then clearly, and if it had passed one statute, then possibly, the two statutes and the two sections respectively would be construed independently of each other. As to the two statutes, this requires no discussion. As to the single statute, if it combined both remedies it could not be called primarily a criminal statute or primarily a civil statute. The two essential objects obviously would be distinct, and each would be tested by its own language in determining its constitutionality. In that event it could be argued that the criminal section, worded broadly as in the Sherman Act, was not specific enough; that it did not declare the exact nature of the offense, and that no one could know in advance what the law condemned, and therefore no indictment, or at any rate no indictment in the language of the statute, would be valid. And this, notwithstanding the fact that the civil statute would not be, for the purpose of an injunction, subject to the same objection. If such a statute had been passed, and if under it the Supreme Court had upheld the constitutionality of the act in equity cases, such decisions [96] would not absolve this court from the obligation of considering the constitutionality and validity of the criminal section.

Such, however, is not the act which was passed by Congress. The Sherman Act is primarily a criminal statute. Its title announces its purpose. Sections 1, 2, and 3 declare certain things to be illegal, and prescribe punishment for their doing. The equitable remedy provided by section 4 does not authorize the Circuit Courts of the United States to enjoin restraints of trade, as such; it does not subject to the processes of a court of chancery, contracts, combinations in the form of trusts or otherwise, or conspiracies or monopolies, in restraint of trade, either definitely or indefinitely. On the contrary, it invests the Circuit Courts of the United States with jurisdiction to prevent and restrain "violations of this act"; and it is a well-known fact that the courts of the United States have no jurisdiction, except such as is conferred upon them by Congress. Here the jurisdiction of the equity courts is made dependent upon the criminal sections. If sections 1, 2, and 3 were repealed by Congress, there would be nothing left of the law to which sections 4 and 7 could

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apply. It is impossible to give effect to the equity sections without reference being had to the criminal section. It authorizes the processes of the Chancery Court to be used only to prevent the carrying out of that which is declared in the prior sections to be criminal. It follows, therefore, that unless that which is sought to be enjoined is a violation of the act under one of the preceding sections, in other words, that, unless that which is sought to be enjoined is a crime, it can not be enjoined, because it is only that which is made a crime by the statute which is subject to the equity jurisdiction. Therefore, if injunctions heretofore have been upheld by the Supreme Court, the Supreme Court in upholding them necessarily has determined that the things which were enjoined were crimes, as defined by one at least of the first three sections of the act. If, however, as is contended, the first three sections of the act are void, there could be no "violation of this act" susceptible of being enjoined. Whether or not there is any merit in the argument on behalf of the defendants is not a matter for this court at this time even to consider, in view of the fact that in the judgment of this court the decisions of the Supreme Court upholding injunctions necessarily involve the proposition that certain things are made criminal by the statute, and that therefore the criminal sections of the statute necessarily must be valid.

The same is true as to the jurisdiction under section 7. Recoveries have been sustained by the Supreme Court under that section. *Montague v. Lowry*, *supra*; *Loewe v. Lawlor*, *supra*. And yet the only authority there vested in the Circuit Court was to award threefold the damages sustained by any individual "by reason of anything forbidden or declared to be unlawful by this act." Nothing is forbidden in terms. Many things are declared to be unlawful. Unless they were unlawful, as defined in the criminal sections, no relief could have been given under section 7. It might be said, of course, that the Supreme Court, in passing upon these civil cases, acted without consideration of the logical extension of the exercise of the civil jurisdiction, and [97] without argument as to the possible invalidity of the first three sections as a criminal statute, and that a decision even of the Supreme Court holding the civil section valid, al-

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though logically necessarily involving a holding that the first three sections are also valid as penal sections, should not be deemed binding upon this court. This argument, however, is inapplicable, because it was pressed strongly upon the Supreme Court in the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, that the criminal sections were invalid for the reasons urged here, and that for that reason the equity sections could not be enforced. Argument of Young, *Northern Sec. case*, 193 U. S. 262, 264, 24 Sup. Ct. 436, 48 L. Ed. 679, Argument of Johnson, 193 U. S. 270, 24 Sup. Ct. 438, 48 L. Ed. 679, Argument of Griggs, 193 U. S. 279, 24 Sup. Ct. 439, 48 L. Ed. 679, Argument of Grover, 193 U. S. 285, 24 Sup. Ct. 442, 48 L. Ed. 679, Argument of Stetson, 193 U. S. 292, 24 Sup. Ct. 443, 48 L. Ed. 679, where he said:

"This act is a criminal statute pure and simple, and its meaning and effect as now determined must also be its meaning and effect when made the basis of a criminal proceeding."

The contention, however strongly urged, did not affect the conclusion of the court. I am of the opinion, therefore, that the Supreme Court of the United States has determined that sections 1, 2, and 3 of the Sherman Act define with sufficient accuracy the offenses therein enumerated.

2. It is urged also that the first and second counts of indictment No. 4,509 are bad for duplicity, because they charge a combination in restraint of trade in the purchase of live stock, and also in the sale of fresh meat. The objection is not sound. The crime charged is a combination in restraint of trade. Such a combination may design to accomplish its object in many different ways, and the enumeration of the various means adopted does not render the indictment bad for duplicity. Duplicity in an indictment means the charging of more than one offense, not the charging of a single offense committed in more than one way. Duplicity may be applied only to the result charged, and not to the method of its attainment. *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

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3. Counsel for defendants also contend that counts 1, 2, and 3 of indictment No. 4,509, and indictments Nos. 4,510 and 4,511, are fatally defective by reason of the use of the word "groups" as designating the defendants representing the Armour, Swift, and Morris concerns. The indictments show that the Armour, Swift, and Morris interests were represented each by certain individuals, and the individuals composing each class are designated as "the Swift group, the Armour group, and the Morris group." This is followed by the charge that each member of each group had full authority to act for his group, and that whenever the word "group" is used it is intended to apply to any or all of the members of each group. In other words, the charge against a group is to be taken to mean that whatever was done was done by one of the members of the group in behalf and by [98] authority of all. In this connection it is argued, "first, that not all of the defendants are charged with the commission of acts; and, second, that those charged and those not charged cannot be separated from each other under the averments." Grand jurors are required to state their charge with as much certainty, and no more, as the circumstances of the case will permit. In this case the jurors knew the men engaged in the matter under their investigation; knew with which of the three great concerns (Armour, Swift, or Morris) each one was associated; believed that they were of one mind as to the plan of operation of their business. It was not known, and probably could not have been discovered, what part in the general programme was assigned to each individual. The practical way, and probably the only possible way, was for the jury to charge as it did that the combination was entered into by the separate groups of men, and that the action of each group was with the consent, knowledge, and design of each constituent member. The indictments charge an unlawful combination, conspiracy and monopoly as a result of joint action, and it is not necessary, to sustain those charges, that each one of the individual participants should have been doing the same thing at the same time. *United States v. MacAndrews* (C. C.) 149 Fed. at page 832. It is quite consistent with a

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charge of combination or conspiracy or monopoly that the individuals concerned therein should each have been assigned to different tasks, aimed to bring about the result planned by all. The indictments charge the ultimate plan, the specific acts by which it was carried out; and, further, that those specific acts were planned and executed by the three groups of individuals, each member of each group acting for himself and every other member of the group. I do not see how the grand jury could have made the charge more definite, and believe that it is sufficiently specific to satisfy the substantive law.

4. The point is made against the counts of indictment No. 4,509 that they fail to charge properly the defendants with responsibility for the acts done; that it appears that the defendants were officers of corporations, and that they could not be liable for corporate doings unless it appeared clearly that they knew of, connived at and directed the things done. The answer to this is found in the indictment, which charges, not that the corporations, but that the groups of individual defendants, did what was alleged to be unlawful; and further, that the defendants managed and controlled the various corporations, and directed the corporate action. More was not necessary.

5. Much stress is laid upon the proposition that indictment No. 4,509 is bad as describing a conspiracy or a contract in restraint of trade, and calling it a combination. The obvious answer to this is that it makes no difference what the grand jury labeled the offense. The question is, Do the facts as stated amount in law to any offense? If the acts charged in this indictment constitute a contract, combination in the form of trust or otherwise, or a conspiracy in restraint of trade or commerce, it is a valid indictment, so far as this objection is concerned.

6. It is apparent that the foregoing objections to the indictment go to matters of form rather than to matters of substance. An indictment is well enough that states facts which constitute a crime, and in language which leaves no doubt in the minds of the defendants of what they are accused. It is true that a defendant should be informed

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clearly by the indictment of the exact and full charge made against him, yet the manner in which the information is given is unimportant. An indictment is sufficient when it contains a substantial accusation of crime, and its statements furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against further prosecution for the same offense, and when, from it, the court can determine that the facts charged are sufficient in law to support a conviction. *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407. The present indictments fulfill all of these requirements. Moreover, section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720) provides:

"No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

7. This brings us to the question whether or not the indictments charge facts sufficient in law to support a conviction under the Sherman act, and for answer we must look to the facts stated, and not to any conclusion drawn from those facts by the grand jury. The indictment in case No. 4,509 charges in substance that there has been carried on from Chicago (and other named cities in different states) an extensive industry involving (1) the purchase of live stock; (2) the slaughter of such stock; and (3) the furnishing of fresh meats to the people in certain named states; that 85 per cent of all fresh meats consumed in the named states has been slaughtered in those cities in designated proportions; that 70 per cent of this 85 per cent "has been carried on, directed and controlled" by the defendants; that the Armour group had branch houses in 317 different towns and cities in different states; the Swift group 280; and the Morris group 82; that the defendants, divided into three groups representing certain corporations or interests, managed, controlled, and directed by them, entered into an agreement: First, that they would not compete in the purchase of live stock, and would make uniform bids for animals of like grade. Second, that

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the three groups by agreement adopted a uniform system of determining the sale price of dressed beef by adding to the cost of the animal on the hoof certain fixed and excessive charges to cover operating expenses, and by deducting certain inadequate allowances for by-products. Third, that each group would direct its sales agents to sell at the prices figured according to the agreement, or, if not at that price, at a certain other price also agreed upon. That by agreeing on the amounts to be paid for the live stock, and upon the amounts to be added for operating charges, and the amounts to be deducted for by-products, and in reaching a uniform sale price they have eliminated all competition in the fresh meat industry between the three groups of defendants. That they [100] were large operators in interstate commerce, and by a combination among themselves they have agreed upon a system which restricted the business of each individual group. The medium through which all groups collected information and operated was the National Packing Company, organized, owned, and directed by the groups collectively. Its office furnished a common meeting ground, and there the total business done by all the defendants, by agreement, would be equalized from time to time, each being permitted to share according to its financial interest, and prices were kept up by increasing or decreasing shipments to particular territories according to market conditions. The whole plan, from its inception, appears plainly to be one to eliminate competition as a factor in fixing prices among the three groups of defendants, beginning with the agreement not to bid against each other, and in fact to bid exactly the same amounts for like grades of live stock, determining a uniform selling price, and ending with fixing a uniform sale price and an apportionment among themselves of the total business done.

Indictments Nos. 4,510 and 4,511 charge substantially the same facts (1) resulting from a conspiracy, and (2) creating a monopoly.

The defendants urge that three great concerns operating side by side, and conducted by men of great business skill, might arrive at the same system of doing business (the tend-

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ency to introduce efficiency methods into our industries might indicate such a possibility); and that all the indictments charge is that the defendants adopted a uniform system of doing business. It need not be disputed that given the same ability, facilities, and capital invested, these three groups of individuals might arrive at very nearly the same method of determining the sale prices of their articles, and that they would endeavor, so far as possible, to obtain such price. The adoption by the defendants of such a system might be accidental or a mere coincidence, but the difficulty with the argument is that the offense charged is not the accidental adoption of a uniform system of doing business, resulting in the fixing of prices, but a system which is the result of concerted action—the result of a combination, conspiracy, or a positive agreement. The law says there may be no contract, combination, or conspiracy in restraint of trade. It is not aimed against accidental restraints of trade. The defendants could not be held for a moment had each group, acting in its own interest, arrived at the identical system of doing business, under which, it is charged, they were operating. It is the maintaining of that system by agreement or combination which constitutes the offense defined by the Sherman Act, provided it results in a restraint of trade, and such a result in this case is direct and inevitable. The aim of the parties is the same, although reached by different means, as that in the *Addyston Pipe case*, where the agreement was that the low bid would be made by one concern, and that the other concerns would make a somewhat higher bid, and that ultimately all would share in the profit.

I am of the opinion that the facts stated in the indictments show clearly a plan or scheme organized and put in operation by the defendants, the ultimate purpose of which was to control the production, [101] sale, and distribution of fresh meat throughout a large section of this country; and, as incidental to that control, to lower prices to the producer of the raw material, and raise prices to the consumer of the finished product. While the facts do not disclose an absolute monopoly, yet the large percentage of the business which they control indicates that they intended to acquire at least

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a commercial monopoly. As Judge Hough said in *United States v. MacAndrews* (C. C.) 149 Fed. at page 833:

"Commerce among the states is not a technical legal conception, but a practical one drawn from the course of business. The criterion as to whether any given business scheme falls within the prohibition of the statute is its effect upon interstate commerce, which need not be a total suppression of trade nor a complete monopoly; it is enough if its necessary operation tends to restrain interstate commerce, and to deprive the public of the advantages flowing from free competition."

The indictments show an agreement, combination, conspiracy and monopoly directly restraining interstate trade. My reading of the indictments is confirmed by the record in the present cases, and has received the sanction of the Supreme Court of the United States.

On May 10, 1902, the district attorney for the Northern District of Illinois filed in the Circuit Court of the United States, in this Circuit, a bill or petition in chancery (case No. 26,291), against these defendants and various corporations and other persons. That action was brought under section 4 of the Sherman Act, and charged the defendants with substantially the same matters and things charged in these indictments. A final decree was entered restraining the defendants from—

"entering into, taking part in or performing any contract, combination or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several states and territories and the District of Columbia, a restraint of trade, either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock, or collusively and by agreement to refrain from bidding against each other at the sales of live stock; or by combination, conspiracy or contract raising or lowering the prices, or fixing uniform prices at which said meats will be sold, either directly or through their respective agents, or by curtailing the quantity of such meats shipped to such markets and agents. * * *"

On May 26, 1903, a new petition was filed, setting out a continuance by the defendants of the matters stated in the original bill.

On December 6, 1910, the defendants in the present proceedings filed their sworn petition, setting out the pleadings

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and orders in chancery suit No. 26,291, and moved this court for an indefinite stay of proceedings. On page 64 of that sworn petition, at paragraph numbered "eighth" it is stated:

"The contemplated acts and transactions of these petitioners restrained and enjoined by said original decree, and the supposed acts and transactions of these petitioners alleged, charged and complained of in said new petition, are the same acts and transactions and are identical in substance and effect."

That same petition then charges, on page 65, in paragraph numbered "ninth" that the grand jurors returned indictment No. 4,509 in which the petitioners were charged with certain offenses, and then continues:

[102] "The alleged acts and transactions of these petitioners charged in and by said indictment to have constituted such combination in restraint of trade and such violation of said Anti-Trust Act are the same identical acts and transactions which are alleged and charged in said new petition against these petitioners."

And on page 66:

"The particular supposed acts and transactions alleged in said indictment No. 4,510 as constituting said illegal conspiracy and said violation of said Anti-Trust Act are the same identical acts and transactions, and not others, which are alleged in said new petition."

And further, on the same page:

"The supposed acts and transactions alleged in said indictment No. 4,511 as constituting the said alleged monopoly are the same identical acts and transactions, and not others, as those charged and alleged against these petitioners in and by said new petition."

The same counsel represented the defendants then as represent them on this demurrer, and even if there were doubt (and I believe there is not) as to whether the bill in chancery charged the same facts as are charged in these indictments, we have the judgment of the defendants themselves that the facts are substantially the same. These indictments were specific enough to warrant the defendants in stating this under oath.

The decree of the Circuit Court in the chancery case was reviewed in the Supreme Court of the United States, and in all essential particulars was sustained, Mr. Justice Holmes delivering the opinion, and all the other members of the

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court concurring. *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518. The court there said:

"The scheme, as a whole, seems to us to be within reach of the law."

In the light of that decision, and upon principle, it follows that the indictments in this case state facts which amount in law to a violation of the Sherman Act.

The demurrers will be overruled.

[102] UNITED STATES v. UNION PAC. R. CO. ET AL.*

(Circuit Court, D. Utah. June 24, 1911.)

[188 Fed. Rep., 102.]

MONOPOLIES (§ 12)—ANTI-TRUST ACT—CONTRACTS OR COMBINATIONS PROHIBITED.—To bring any transaction within the condemnation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), it must be a contract, combination, or conspiracy in restraint of international or interstate commerce, and this restraint must be substantial in character and the direct and immediate effect of the transaction complained of.^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

[103] CARRIERS (§ 33)—THROUGH JOINT RATES—OPTION OF CARRIERS TO ESTABLISH.—Prior to the passage of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]), in 1906, connecting railroads were free to adopt or refuse to adopt joint through tariff rates, and this freedom was not abridged, as between the Union Pacific Railroad Company and the Central Pacific Railroad Company, by either section 12 of act July 1, 1862, c. 120, 12 Stat. 495, requiring the roads of such companies to be operated as one continuous line, so far as the public or the government are concerned, or section 15 of act July 2, 1864, c. 216, 13 Stat. 362, which requires them to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 86-90; Dec. Dig. § 33.]

* Pending in the Supreme Court on the appeal of the United States.

^b Syllabus copyrighted, 1911, by West Publishing Company.

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MONOPOLIES (§ 16)—ANTI-TRUST ACT—COMPETING RAILROAD LINES—UNITING CONTROL.—In 1901 the Union Pacific Railroad Company bought stock of the Southern Pacific Company, which gave it practically a controlling interest, and the United States brought suit to enjoin the voting of such stock, on the ground that its acquisition was for the purpose of suppressing competition between the two companies in interstate commerce, and of monopolizing such commerce or a part thereof, in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). At that time the Southern Pacific Company owned and operated a steamship line between New York and New Orleans, and rail lines from the latter place to the Pacific Coast, and by way of San Francisco to Portland, Or. It also owned and operated the line of the Central Pacific Railroad Company between San Francisco and Ogden, Utah, from which point it connected eastward with the line of the Union Pacific and also with another competing line. The main line of the Union Pacific extended from Omaha to Ogden, with a branch from Kansas City westward to a connection with the main line. It also, through subsidiary companies, owned and operated a line from a connection with its main line to Portland, and from there operated steamship lines to the Orient and to San Francisco. For through freight for the Pacific Coast originating east of its Missouri river terminals it was dependent on other roads, with which it there connected, and practically all of such freight for San Francisco was forwarded from Ogden over the Central Pacific line, 800 miles long, for which the Southern Pacific received about four-tenths of all the freight from Omaha or Kansas City westward. The rail and water line of the Union Pacific from Ogden to San Francisco by way of Portland was 1,700 miles long, its steamer service was irregular, and the amount of freight sent that way was negligible. The two companies were competitors to a small extent for Oriental business, for business from the Atlantic seaboard to Portland and vicinity, and also, through branches and connecting lines to and from other common points; but the total amount of such competitive business done by the Southern Pacific during the year ending in 1901 amounted to only 0.88 per cent. of its entire tonnage, and that done by the Union Pacific but 3.10 per cent. of its entire tonnage. While the Union Pacific maintained agents in the East to solicit business, it was chiefly from connecting carriers, and it received little more in freights for such business than did the Southern Pacific. *Held*, that the two roads were not substantial competitors for interstate or foreign business, in such sense that the purchase of the stock by the Union Pacific, for the purpose of giving it an assured connection with San Francisco, which it could control, constituted a direct restraint upon such commerce, in violation of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

Syllabus.

[104] MONOPOLIES (§ 24)—ANTI-TRUST ACT—SUIT FOR VIOLATION.—

The purchase by an interstate railroad company of a majority of the stock of another company operating a competing line affords no ground for the granting of an injunction under Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), where such stock was sold prior to the suit.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 16)—ANTI-TRUST ACT—VIOLATION.—The purchase by an interstate railroad company of stock of another company operating a competing line, where it was insufficient in amount to give control of its competitor, and no attempt was made to exercise such control, does not effect a combination in restraint of interstate commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

MONOPOLIES (§ 16)—ANTI-TRUST ACT—CONTRACTS PROHIBITED.—A contract to strangle a threatened competition, by preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic, is one in restraint of interstate commerce, and in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

MONOPOLIES (§ 16)—ANTI-TRUST ACT—CONTRACT BETWEEN RAILROAD COMPANIES.—The Union Pacific Railroad Company, through a subsidiary company, had projected and partly built a line of road between Salt Lake City and Los Angeles, when a controversy arose over a portion of the right of way through the mountains between that company and another, which also desired to build a road between the same points, which was finally settled by an agreement to unite and build a road in which each party should own a half interest, with a further agreement respecting rates on through business. The Union Pacific Company at that time owned a controlling interest in the Southern Pacific Company, which owned and operated a line through Los Angeles to San Francisco, and one from there to Ogden, near Salt Lake City. *Held*, that the new line, which was direct, and much more serviceable and convenient for the public, was not a natural competitor of the Southern Pacific Company with respect to business between Los Angeles and Salt Lake City in such sense as to constitute the agreement under which it was built a combination in restraint of interstate commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), nor was it unlawful thereunder, on the ground that it prevented the building of two

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lines, instead of one, it appearing that there was but one practicable route through the mountains, over which it was not feasible to construct two lines, nor because of the minor and incidental provisions relating to the exchange of business.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

MONOPOLIES (§ 24)—ANTI-TRUST ACT—COMBINATIONS OR CONSPIRACIES IN RESTRAINT OF INTERSTATE COMMERCE.—Contracts entered into by a railroad company, not in themselves unlawful as in restraint of interstate commerce, in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), [105] *held* not to evidence a combination or conspiracy to restrain such commerce, in view of evidence showing that they did not have such effect.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.]

Hook, Circuit Judge, dissenting.

In Equity. Suit by the United States against the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, the Oregon Railroad & Navigation Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, the Atchison, Topeka & Santa Fe Railway Company, the Southern Pacific Company, the Northern Pacific Railway Company, the Great Northern Railway Company, the Farmers' Loan & Trust Company, Edward H. Harriman, Jacob H. Schiff, Otto H. Kahn, James Stillman, Henry H. Rogers, Henry C. Frick, and William A. Clark. Decree for defendants.

This suit is grounded upon the anti-trust law of Congress approved July 2, 1890 (26 Stat. 209), to dissolve an alleged contract, combination, or conspiracy in restraint and monopoly of interstate and foreign trade between the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, and the Oregon Railroad & Navigation Company on the one hand, and the Southern Pacific Company, the Northern Pacific Railway Company, the San Pedro, Los Angeles & Salt Lake Railroad Company, and the Atchison, Topeka & Santa Fe Railway Company on the other hand. Edward H. Harriman, Jacob H. Schiff, Otto H. Kahn, James Stillman, Henry H. Rogers, Henry C. Frick, and William A. Clark, through whom it is averred the combination was created or is maintained, are also made defendants.

The specific charges are: That in 1901 and subsequently the Union Pacific Company, acting by itself or through a subsidiary corporation owned and controlled by it, acquired a controlling interest in the capital stock of the Southern Pacific Company, for the purpose of

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directing its operations and suppressing competition theretofore existing between the two in interstate and foreign commerce and monopolizing the same; that in the same year it, with like purpose, acquired a majority of all the stock of the Northern Pacific Railway Company, and subsequently induced the San Pedro, Los Angeles & Salt Lake Railroad Company and its promoters, the defendant William A. Clark and his associates, to desist from constructing an independent line of railroad between San Pedro, Cal., and Salt Lake City, Utah; that in 1904 the defendants Harriman, Schiff, Kahn, Stillman, Rogers, and Frick purchased stock of the Atchison, Topeka & Santa Fe Railway Company, of the face value of \$30,000,000, and thereby secured the election of Frick and Rogers, who were directors of the Union Pacific Company, as members of the board of directors of the Santa Fe Company, and later, in the year 1906, the Union Pacific Company, through the Oregon Short Line, purchased stock of the Santa Fe Company, of the face value of \$10,000,000; and that these purchases were so made for the purpose of eliminating competition of the Santa Fe Company and monopolizing for the Union Pacific Company interstate and foreign commerce. These and some other minor charges, which will be referred to later, are relied upon to establish conspiracies in violation of the act. The prayer is that the defendants, who purchased the stocks, be enjoined from voting or otherwise acting as owner of them, and the other corporate defendants be enjoined from permitting them to vote the stocks or paying dividends upon the same, and for general relief.

The answer puts in issue all the material averments of the bill, and the cause is submitted to the court for a final decree on the pleadings and proof. The essential facts are these:

Prior to 1901 the Union Pacific Company owned and operated a main line of railroad, extending from Omaha on the east to Ogden on the west, with a branch extending from Kansas City on the east, through Denver, to a connection with its main line at Cheyenne; owned the capital stock of the Oregon Short Line Company, which operated a railroad extending from the main line at Granger, Wyo., to Huntington, Oreg.; and owned or controlled the capital stock of the Oregon Railroad & Navigation Company, which operated a line of railway extending from Huntington to Portland, where it connected with lines of steamships operated by it, running to some Oriental ports and to San Francisco. The steamship line across the sea had just been organized, and had not engaged in business until 1900 or 1901. It was neither organized nor equipped for general traffic, but only for transporting grain and flour originating on the line of the Oregon Railroad & Navigation Company in competition with the Northern Pacific and Great Northern Railroads. Its sailings were scheduled every 30 days, but were in fact irregular and uncertain. The tonnage of Oriental traffic over this line was infinitesimal compared to the total tonnage of the system, being only .062 of

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1 per cent. of it. The steamship line from Portland to San Francisco was likewise an inadequate provision for any regular traffic and particularly transcontinental traffic. Its sailings were irregular and unreliable, so that the Union Pacific Company had under its ownership, or control through subsidiary lines, a transportation route, as just described, from Omaha and Kansas City to some Oriental ports and to San Francisco, by way of Portland.

The Union Pacific had connections at Omaha with the Chicago, Milwaukee & St. Paul, the Chicago & Northwestern, the Chicago, Burlington & Quincy, and other railways leading to Chicago, and connecting at that point with many, if not all, the great trunk lines leading to New York and intervening points. It also had connections at Kansas City with the Missouri Pacific, Wabash, Chicago & Alton, and other railways leading to St. Louis, and connecting there with trunk lines extending to New York and intervening points. It also had divers important feeding-in or branch lines along its route.

In 1901 the Southern Pacific Company owned or controlled a line of steamships operating between New York and New Orleans, and a line of railway extending from New Orleans, through Louisiana, Texas, New Mexico, Arizona, and California, to San Francisco, and thence through Oregon to Portland, with several branch lines along its route extending into tributary territory. It also owned all the capital stock of the Central Pacific Railroad Company, which owned the line of railway extending between San Francisco and Ogden and had a majority of the stock of the Pacific Mail & Steamship Company, which operated lines of steamships between San Francisco to and from Panama and Oriental ports; so that the Southern Pacific Company had a transportation route over land and sea extending from New York, via San Francisco, to two terminal points, Ogden, Utah, and Portland, Or. It also connected at New Orleans with the Illinois Central, Louisville & Nashville, Queen & Crescent, and other roads, which opened up to it the traffic of the Middle States, and owned a line of railway extending from New Orleans to Ft. Worth, Tex., and to connections there with roads leading to Colorado and Utah common points.

The Atchison, Topeka & Sante Fe Railway Company in 1901 owned or controlled a main line of railway extending from Chicago, through Illinois, Missouri, Kansas, Colorado, New Mexico, Arizona, and California, to San Francisco.

The Northern Pacific Railway Company in 1901 owned a line of railway extending from Lake Superior and St. Paul, through Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, to Seattle and the Pacific Coast, and through ownership of a controlling interest in the capital stock of the Chicago, Burlington & Quincy Railroad Company, which operated lines of road in Minnesota, South Dakota, Iowa, Illinois, Wisconsin, Missouri, Nebraska, Kansas, California, and Wyoming, it controlled the transportation of that com-

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pany. The last-named company connected at several points with the Union Pacific, and was a natural and important feeder for it.

The San Pedro, Los Angeles & Salt Lake Railroad Company was organized in 1902 for the purpose of constructing a line of railway extending from San Pedro, Cal., across the states of California and Nevada in a northeasterly course, to Salt Lake City.

From El Paso, Tex., on the Southern Pacific line, the Texas & Pacific Railroad ran across the state of Texas to Texarkana, and there connected with [107] the rails of the St. Louis, Iron Mountain & Southern Railroad, which extended to St. Louis. At St. Louis the last-named road connected with the Wabash, for the East, and the Missouri Pacific, for Pueblo, Colo., and there connected with the Denver & Rio Grande Railroad, which ran to Ogden. These last-mentioned roads constituted what is known as the Gould System, and operating under one general management, swung around from a point on the Southern Pacific at El Paso to another point on the Southern Pacific at Ogden. The last-named company constituted its only connection into California, and afforded its only opportunity for participation in transcontinental business.

In 1898 the Union Pacific Company, which had been in the hands of a receiver since 1893, was reorganized, and Mr. Harriman and his associates came into control. They soon adopted and put into execution plans of a stupendous character for the rehabilitation and reconstruction of the road, involving an expenditure of many millions of dollars. Apart from possible rights conferred by the acts of Congress approved July 1, 1862 (12 Stat. 489), July 2, 1864 (13 Stat. 356), and June 20, 1874 (18 Stat. 111 [U. S. Comp. St. 1901, p. 3577]), known as the "Pacific Railroad Acts," the Union Pacific Company had no independent right of co-operation by through route or joint rates with the Southern Pacific for the Pacific Coast trade, and in fact no other direct connection was open to it for that trade except the Southern Pacific road itself. The Rio Grande and its allied lines and connections with trunk lines from the east at St. Louis was available to the Southern Pacific as a connection at Ogden for business for the Atlantic seaboard and Middle states. To meet a menace occasioned by this situation and secure a reliable and permanent arrangement for Pacific Coast business, Mr. Harriman, acting for the Union Pacific Company, first tried to purchase from the Southern Pacific Company the old Central Pacific line, extending between Ogden and San Francisco, and failing in this, entered into negotiations with C. P. Huntington in his lifetime for the purchase of a large block of the capital stock of that company, owned by him. Being unsuccessful in this, he renewed his efforts to secure that stock from Mr. Huntington's heirs and devisees after his death, in 1900. In this effort he had a competitor in George Gould, acting for the Gould interests. It resulted, in 1901 and 1902, in the purchase for the Union Pacific Company of 900,000 shares, and these, with the shares of some preferred

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stock afterwards issued and taken by it, made a holding of a little over 46 per cent of the total outstanding issue of Northern Pacific stock. This was a holding sufficient, according to the usual conduct of corporate affairs, to insure to the Union Pacific Company control in the management of the Southern Pacific Company.

In 1901 the Northern Pacific Company acquired a controlling interest in the Chicago, Burlington & Quincy Railroad, which was a natural and actual feeder to the Union Pacific Company. After an unsuccessful effort to secure from Mr. Hill, who acted for the Northern Pacific Company, a partial interest in that purchase, in order to insure a continuation of the fair and equitable relations which had theretofore existed between the Union Pacific and the Burlington roads, Mr. Harriman purchased for the Union Pacific Company a majority of the capital stock of the Northern Pacific Company, including in his purchase more of the preferred than of the common stock. The preferred, by action of the board of directors of the latter company, was soon retired. The Northern Securities Company was afterwards organized, and the common stock transferred to it. Upon its dissolution in 1906, the Union Pacific Company was required to accept a part of the stock of the Great Northern Railway Company in lieu of some of its former holdings in the common stock of the Northern Pacific Company. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 25 Sup. Ct. 483, 49 L. Ed. 739. If the Union Pacific Company acquired any controlling or influential interest in the management of the Northern Pacific Company, these things resulted in the loss thereof. Finally, in the years 1908 and 1909, holdings of the Union Pacific Company in Northern Pacific or Great Northern stock entirely ceased.

In 1904 the defendants Harriman, Rogers, Stillman, Frick, Kahn, and Schiff purchased for themselves as individuals \$30,000,000 in par value of the common stock of the Atchison, Topeka & Santa Fe Railway Company, and [108] later in 1906 the Union Pacific Company invested \$10,000,000 of its idle money in the preferred stock of that company. The individuals who purchased and owned the common stock secured the election of two of their syndicate, the defendants Frick and Rogers, as members of the board of directors of the Santa Fe Company. They were at that time also members of the board of directors of the Union Pacific Company. The holding of the last-mentioned company of \$10,000,000 in the preferred stock of the Santa Fe Company was about 5 per cent of the total outstanding stock of the latter company. This was all disposed of in 1909.

Some time after the acquisition by the Union Pacific Company of the Southern Pacific stock, the latter company became involved in a controversy with the Phoenix & Eastern Railroad Company, the owners of a short line of road in Arizona. Litigation ensued, and resulted in the sale of the Phoenix & Eastern Railroad to the Southern Pacific Company. About that time there was a consolidation of a short line of road (about 90 miles) in the northwestern part of California with

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the Southern Railway Company. This consolidation was made pursuant to the laws of the state of California.

Prior to 1890 the Union Pacific Company through its subsidiary company, the Oregon Short Line, constructed a line of railroad extending from Salt Lake City in a southwesterly direction to Milford, a point near the state line between Utah and Nevada, a distance of about 206 miles, and plans were made for an extension of the road further southwestwardly and ultimately to Los Angeles. Grading had been done at a heavy cost on this extension for a further distance of 117 miles, a part of the way being through a rugged and narrow defile in the mountain, when, on account of financial embarrassments culminating in the receivership of the Union Pacific and Oregon Short Line Companies, work had to be abandoned. In the meantime a tax deed purporting to convey title to the graded road had been secured by defendant Clark and his associates, who sought to construct a part of a line of railway projected by them between Salt Lake City and Los Angeles over it. This provoked proceedings in the Land Department and courts by the Oregon Short Line to assert its rights, which resulted favorably to its contention. *Utah N. & C. R. Co. v. Utah & C. Ry. Co.* (C. C.) 110 Fed. 879.

Pending subsequent controversies between the parties, an adjustment was reached whereby the two promoters, the Oregon Short Line and the Clark interests, proceeded jointly to construct and operate a single line, each taking one-half interest in the stock of the San Pedro, Los Angeles & Salt Lake Company, which owned and operated it. It was not completed, and no commerce passed over it, until 1905. In the further adjustment of their differences, certain permanent provisions relating to joint, through, and local rates were made, favorable to the interests of the Union Pacific Company and its allied roads as a system.

Prior to 1901 agents of the Union Pacific, Southern Pacific, and Santa Fe roads were actively engaged in New York, and elsewhere in securing business between New York, Pittsburg, and interior points to the Pacific Coast. The Union Pacific Company, having no through route, had to depend upon connections with other roads at either end of its line, and to share with them the revenue resulting from the traffic secured in such proportions that out of the through rate it received but a minor part; for instance:

	Per cent.
On traffic from New York to San Francisco, via Omaha and Ogden, it received of the through rate only.....	34.4
Its connections east of Omaha received.....	35.5
And the Southern Pacific, from Ogden to destination, received....	30.1
On traffic from New York to San Francisco, via Kansas City and Ogden, it received of the through rate only.....	30.5
Its connections east of Kansas City received.....	38.6
And the Southern Pacific, from Ogden to destination, received....	30.9

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	Per cent.
On traffic from Cincinnati to San Francisco, via Omaha and Ogden, it received.....	40.4
Its connections east of Omaha received.....	24.4
And the Southern Pacific, from Ogden to destination, received...	35.2
[109] On traffic from Chicago to San Francisco, via Kansas City and Ogden, it received of the through rate only...	
Its connections east of Kansas City received.....	43.6
And the Southern Pacific, from Ogden to destination, received...	14.2
	42.2

From these fairly illustrative instances it appears that, on transcontinental traffic from New York and important interior points by way of the Union Pacific road to San Francisco, the connections of the last-mentioned road on both ends received practically two-thirds of the total freight rate; the Southern Pacific itself receiving about the same proportion of it as the Union Pacific did. On the other hand, the Southern Pacific received on freight from New York common points to San Francisco by way of New Orleans on its own route all the through rate, and on freight from Cincinnati, Chicago, and other interior points to San Francisco via New Orleans the total through rate less the small portion required by the initial carriers for transportation from point of origin to New Orleans.

Many witnesses testified generally that the Union Pacific and Southern Pacific were prior to 1901 competing lines for transcontinental business and had separate soliciting agents in New York and elsewhere. The proof amply shows that they were active in securing routings of freight and passengers to California, but that they did it in two ways: One by direct solicitation of shippers and passengers, and the other by securing and fostering friendly relations with the initial carriers at the points of origin of the traffic. The initial carrier commonly was able to and did determine the routing of all traffic. Notwithstanding the right of the shipper in the abstract to do so, the initial carrier practically settled the question so as best to serve its own interest.

In so far, however, as the initial carrier was influenced by the shippers and they by the soliciting agents, the result was this: As between the Southern Pacific and the Union Pacific, the agents of the former exercised their influence in favor of their through route by way of New Orleans; but, as between the Union Pacific and the Santa Fe, the agents of the Southern Pacific exercised their influence in favor of the Union Pacific route, as it thereby secured for itself a haul of 800 miles over its own road from Ogden to San Francisco, the last connecting link into California.

The actuating intent and purpose of the Union Pacific Company in acquiring the Huntington stock was to secure a permanent and reliable connection at Ogden for through traffic over the Central Pacific line to the Pacific Coast, and thereby to save the necessity for constructing a road of its own from Ogden to San Francisco.

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The facts relating to less important competition (1) between the Atlantic seaboard and interior points on the one hand and Portland, Or., on the other, (2) between the Atlantic seaboard and Colorado and Utah common points, (3) between Portland and Utah, Colorado, and Nevada common points, (4) between San Francisco and Portland, (5) between San Francisco and Montana and Idaho common points, and (6) between New York and interior common points and the Orient, will be specifically referred to so far as necessary in the opinion.

Frank B. Kellogg and Cordenio A. Severance (*George W. Wickersham*, Atty. Gen., on the brief), for the United States.

N. H. Loomis, P. F. Dunne, and D. T. Watson (*H. F. Stambaugh and John M. Freeman*, on the brief), for defendants.

Before SANBORN, VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above).

1. To bring any transaction within the condemnation of the first section of the anti-trust law, it must be a contract, combination, or conspiracy in restraint of interstate or international commerce. This restraint [110] must be substantial in character and the direct and immediate effect of the transaction complained of. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and cases cited. The most important feature of the complaint in this case, and the one chiefly relied upon by counsel for the government in support of their contentions, is the purchase in 1901 by the Union Pacific Company of a controlling interest in the capital stock of the Southern Pacific Company. Its consequences are alleged to have been the destruction or restriction of free competition in transcontinental commerce. Whether such consequences followed depends upon whether these companies were or could have been independent and substantial competitors before the transaction in question occurred. *Kimball v. Atchison, T. & S. F. R. Co.* (C. C.) 46 Fed. 888. Most obviously, if they were not and could not then have been such competitors, the securing of control of both by one did not destroy or stifle competition. *Northern Securities Co. v. United States*, 193 U. S. 197, 831, 24 Sup. Ct. 436, 48 L. Ed. 679.

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The question then is: Was the line of the Union Pacific Company, extending only from Omaha and Kansas City on the east to Ogden on the west a competing line prior to 1901 for transcontinental business with the Southern Pacific Company, whose line extended from New York on the east over the sea to New Orleans, and thence by rail to San Francisco and Portland on the west? The question is not whether it constituted a continuous line over which traffic might possibly be moved from the Atlantic seaboard or interior to the Pacific Coast, but whether it constituted a feasible route over which it could enter naturally and profitably into competition with the Southern Pacific route for that traffic.

Claim is not made that it was such a competitor for any business originating on or near to its main line, but only for business originating in New York or Pittsburg common points, 1,000 or more miles away from its line. Its traffic between New York and interior points, on the one hand, and Portland, Oreg., on the other, was of trifling importance, amounting for the fiscal year preceding the purchase of the Huntington stock to only 0.46 per cent of its total tonnage. Accordingly its competitive relation to the Southern Pacific route with respect to traffic in and out of San Francisco, the chief gateway for trans-continental business, will first be considered.

It had a connection at Granger with its subsidiary lines, the Oregon Short Line and the Oregon Railroad & Navigation Line, extending to Portland, and there with a line of steamboats irregularly and infrequently running between that port and San Francisco. But this detour through Portland and over the sea was long, unreliable, and unsatisfactory, and afforded no opportunity for fair, and remunerative competition with the Southern Pacific for San Francisco trade. It was about 1,700 miles in length, as against 800 miles in direct line from Ogden to San Francisco. In fact, prior to 1901 it had never been employed in any substantial way as an outlet for the Union Pacific's west-bound freight into San Francisco. It is inconceivable, therefore, that the Huntington stock was purchased to prevent, or had

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the [111] effect of preventing, in any substantial way, free competition with so devious and impracticable a route.

We shall accordingly dismiss it from further consideration so far as transcontinental business is concerned, and pass to the important question upon which argument was concentrated: Whether the right, privilege, or practice, whatever it may have been, of connecting with the rails of the Southern Pacific at Ogden and of using that company's line between Ogden and San Francisco, together with the right, privilege, or practice of connecting at Omaha and Kansas City with the lines of other railroads, which by themselves and by successive connections led to the points of origin of the traffic, constituted the Union Pacific a competitor of the Southern Pacific for that traffic. It is certain the Union Pacific by itself could do none of that business. It extended neither to its origin nor destination. It depended for success upon its connections with other railroads at the east and with its alleged competitor at the west end of its own line.

2. Prior to the enactment of the provisions of the fourth section of the act of June 29, 1906 (34 Stat. pt. 1, p. 590 [U. S. Comp. St. Supp. 1909, p. 1159]) known as the "Hepburn Act," there was no way of coercing railroad companies into establishing through routes or joint rates with each other. In *Southern Pacific v. Interstate Com. Com.*, 200 U. S. 536, 553, 26 Sup. Ct. 330, 334, 50 L. Ed. 585, the Supreme Court speaking of a time antedating the Hepburn act, said:

"It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The commerce act recognizes such right, and provides for the filing with the commission of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads. It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the

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transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses."

Whether, therefore, the great Eastern lines and their connections, which gathered up the west-bound freight, should favor the Union Pacific, the Southern Pacific, or the Santa Fe routes, as their final connection into San Francisco, was optional with them. If they favored the Union Pacific, the terms of their arrangement, whether for a reasonable participation by each in the through rates, or on the basis of local rates for the service of each, or otherwise, were not within the power of the Union Pacific itself to determine, or of the courts, in the absence of legislative authority, to enforce. If, perchance, the Union Pacific had for a time a voluntary arrangement with the Chicago, Milwaukee & St. Paul, the Michigan Central, and the New York Central for a through route and joint rates on traffic destined from New York common points to Ogden and thence to San Francisco, can it be true that that fact by itself would have constituted the Michigan Central a competitor of the Southern Pacific for [112] that traffic within the intent and meaning of the Anti-Trust Law? If not, it does not seem to us that the Union Pacific Company, another intermediate link, like it, in the same temporary through route, could have been such a competitor. But we do not rest our conclusion on this feature of the case alone.

3. In view of the fact that the Southern Pacific owned and operated the road from Ogden to San Francisco, with which alone (except for the circuitous and impracticable route via Portland and the sea to San Francisco) the Union Pacific could have connected, and over which alone it could have carried its traffic into San Francisco, we are unable to understand how the Union Pacific could have been an independent competitor with the Southern Pacific for business over that road into San Francisco. While the Union Pacific was entirely dependent upon the Southern Pacific for its connection westward, the Southern Pacific was not at all dependent upon the Union Pacific for its connection eastward. The Denver & Rio Grande Company and its allied lines under one control had a through route extending from Ogden,

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through Denver, Kansas City, and St. Louis, to Chicago and other interior points, and thence by many available connections to New York and the seaboard. This was obviously a most attractive and powerful rival of the Union Pacific Company, and a constant menace to its success. The latter was in no position to coerce any action by the Southern Pacific. Its hands were tied.

But, it is argued, it could retaliate by using its influence to induce initial carriers or shippers to route transcontinental freight by way of Portland and the sea to San Francisco. This being such a long and unreliable route, little success could have been reasonably expected in such retaliation. If the Rio Grande should have been favored by the Southern Pacific as its Eastern connection, the Union Pacific, in the language of the witnesses, would have been practically bottled up at Ogden. With the advantage possessed by the Southern Pacific as an initial carrier to deflect all east-bound traffic to another line at Ogden, and with the right to exact on all east or west bound traffic local rates, instead of a fair and just proportion of an established through rate, the Southern Pacific would easily have put a quick and decisive ending to any hostile rivalry or competition, if such had been hazarded by the Union Pacific. This absolute dependence by the latter upon the Southern Pacific for a distance of 800 miles of its only through route, to say nothing of its dependence upon the voluntary action of its Eastern connections already pointed out, in our opinion, rendered any equal or profitable competition between them impossible. No real rivalry in the nature of things could have subsisted as long as the success of one was dependent upon the consent or favor of the other. Instead of the situation being competitive, the two roads really acted together and co-operated between themselves and with their connections in securing as much of the trans-continental traffic, each for the other, according to their respective facilities, as they could get, and participated in the total revenue on a basis of comparative service rendered. Their relations were like those of a limited partnership, rather than those of hostile competitorship.

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[112] But it is said the Pacific Railroad acts, *supra*, obligated the Union Pacific and Central Pacific (the predecessor in right of the Southern Pacific so far as the road from Ogden to San Francisco is concerned) to the establishment of through routes and maintenance of joint rates, and take these roads out of the operation of the rule announced in the case of *Southern Pacific Company v. Interstate Com. Com.*, *supra*. But we do not so interpret them. Those acts required the two roads, the one from Ogden east to Omaha and Kansas City, and the other from Ogden west to San Francisco, or their predecessors, to be "operated and used for all purposes of communication, travel and transportation so far as the public and government are concerned, as one continuous line" (section 12, Act July 2, 1862, 12 Stat. 495), and also required them in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others * * *" (section 15, Act July 2, 1864, 13 Stat. 362).

The act of 1862 not only provided for the continuous operation of the roads, but empowered them to consolidate (section 16); and so likewise did the act of 1864 (section 16). These acts were obviously intended to secure a permanent physical connection between the roads and to provide generally for equal accommodations to the public on the basis of independent carriers; but we discover in them no provisions or machinery by which the Southern Pacific, as successor to one of them, could have been compelled by the courts or otherwise to make agreements governing interchange of traffic or through rates, or fixing the division of such through rates between the two roads. Section 15 of the act of 1864 is not substantially different, so far as the matter under consideration is concerned, from section 3 of the interstate commerce act of 1887 (24 Stat. 380). They both forbid discrimination in rates between connecting lines. Section 3 has been held by the Interstate Commerce Commission and by the Court of Appeals of this circuit not to invest the commission or the courts with power to compel carriers to make

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contracts or agreements for through billing of freight or for joint rates. On the contrary, it was held that such matters are left to the voluntary determination of the interested carriers. *L. R. & Mem. R. R. Co. v. E. Tenn., etc., Co.* 3 Interst. Com. R. 1; *Little Rock & M. R. Co. v. St. Louis & S. W. Ry. Co.*, 63 Fed. 775, 11 C. C. A. 417. See, also, to the same effect, *Oregon Short Line, etc., v. Northern Pacific R. Co.* (C. C.) 51 Fed. 465, 474, and *Chicago & N. W. Ry. Co. v. Osborne*, 52 Fed 912, 914, 3 C C. A. 347.

The voluminous evidence of officers, agents, and shippers to the effect that active competition existed between the Union Pacific and Southern Pacific roads prior to 1901 must be considered in the light of the legal and physical relations of the roads to each other and of other related facts. Whether there was competition or not, in view of all these things, is a mixed question of law and fact, and not susceptible of determination by the preponderance of proof as an issue of fact only. Without doubt there was active competition, but [114] it was chiefly in co-operation with initial lines, which had the routings of freight, and for the benefit of such initial lines and their connections to Omaha or Kansas City, as well as for the benefit of the Union Pacific Company itself. Even so far as it was for the benefit of the latter company, it operated necessarily for the benefit of the Southern Pacific to an extent of about eight-twentieths of the haul after the Union Pacific took it at Omaha or Kansas City. In this condition of things, the opinions of any number of witnesses as to whether the two were competing lines within the meaning of the law is of little aid, and the general statement of those witnesses that the two roads had separate soliciting agents throws little, if any, light upon the ultimate issue.

The immediate and actuating intent and purpose of the Union Pacific Company in acquiring the Huntington stock, and thereby the control of the operations of the Southern Pacific line, were, according to the proof, to secure a permanent working and reliable connection at Ogden over an existing road for its through traffic; a connection not dependent upon the grace of a dominant copartner, but one within

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its own control. We recognize the proposition that, if the necessary and direct result of the purchase of the Huntington stock was to destroy or substantially suppress free and natural competition, before then existing between the two companies, or if that purchase put it within the power of the Union Pacific Company to destroy or suppress such competition, the latter-named company would undoubtedly be held to have intended the natural and reasonable consequences of its act, and, notwithstanding the dominant purpose just mentioned, would have violated the Anti-Trust law. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Co. v. United States*, 193 U. S. 197, 328, 332, 357, 24 Sup. Ct. 436, 48 L. Ed. 679.

Our conclusion is that all the facts of this case, considered in their natural, reasonable, and practical aspect, and given their appropriate relative signification, do not make the Union Pacific a substantial competitor for transcontinental business with the Southern Pacific in or prior to the year 1901. We therefore pass to a consideration of some less important matters relied upon by the government to establish destruction of competition between those companies.

It is contended that it was destroyed or suppressed in transcontinental business between the Atlantic seaboard and Middle states, on the one hand, and Portland and Willamette Valley common points, on the other hand. The route of the Southern Pacific for this business was by its own line via New Orleans and San Francisco to Portland, and that of the Union Pacific was by its own line from Omaha and Kansas City to Ogden, together with its connections and subconnections eastward from Omaha and Kansas City, and its subsidiary lines, the Oregon Short Line and Oregon Railroad & Navigation Company running northwestwardly into Portland and the Valley. The geographical relation of these routes to each other, and the dependence of one of them, at least, upon voluntary arrangements with other lines, would seem to render natural and fair competition between them for the Portland trade impossible; but the [115] slight volume of the traffic here involved affords a controlling and decisive consideration. For the year ending June 30, 1900.

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the tonnage of the Southern Pacific Company in this trade was only 0.10 per cent of its total tonnage. For the same year the tonnage of the Union Pacific Company in this trade was only 0.46 per cent of its total tonnage.

Again, it is contended that the control of the Southern Pacific Company acquired by the Union Pacific Company suppressed free competition between them for business between the Atlantic seaboard and Colorado and Utah common points. The route of the Southern Pacific available for this traffic was from New York to New Orleans or Galveston by sea; thence over its own line to Ft. Worth, Tex.; thence over its connection, the Colorado & Southern, to Denver; thence over another connection, the Denver & Rio Grande, into Utah.

The route of the Union Pacific Company available for it was its own line from Kansas City and Omaha to Denver and Ogden, with its numerous initial connections and sub-connections, and also a line by sea from New York to Newport News and Savannah; thence by connections at those places with such railroads as would favor them through the interior of the country to the beginning of its own rails at Kansas City or Omaha.

Physically and practically speaking, in view of the circuitry of the route of the Southern Pacific and of the necessary dependence of both companies upon volunteer connections, real rivalry between them for this traffic does not seem to have been possible; but here again the traffic itself was of little volume and comparatively unimportant. For the year ending January 30, 1900, the tonnage of the Southern Pacific in this business was only 0.19 per cent of its total tonnage. For the same year the tonnage of the Union Pacific in this traffic was only 0.47 per cent of its total tonnage.

A like contention is made concerning the traffic between San Francisco, on the one hand, and Portland and points in the Willamette Valley, on the other hand; but this traffic was also small. For the year ending June 30, 1901, the tonnage of the Southern Pacific in this traffic was only 0.36 per cent of its total tonnage, and the tonnage of the Union Pacific Company in it for the same period was only 1.27 per cent of its total tonnage. A similar contention is made con-

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cerning the traffic from Portland and Willamette Valley common points, on the one hand, and Ogden and its common points, on the other. The route of the Southern Pacific Company for this business was by the so-called Shasta route from Portland to Sacramento, and thence via the old Central Pacific route to Ogden. This was a long and circuitous route, compared to that of the Union Pacific Company from Portland via Oregon Railroad & Navigation Company and Oregon Short Line to Ogden. Not only is this so, but the business was trifling. For the year ending June 30, 1901, the tonnage of the Southern Pacific in it was only 0.01 per cent of its total tonnage, while that of the Union Pacific was only 0.36 per cent of its total tonnage.

A like contention is made concerning traffic from San Francisco, on the one hand, and points in Montana, Idaho, Eastern Oregon, and [116] Washington on the other hand. Without commenting upon the uncompetitive character of those routes for this business, it suffices to call attention to the insignificance of the traffic itself. For the year ending June 30, 1900, the tonnage of the Southern Pacific Company in it was only 0.02 per cent of its total tonnage, while that of the Union Pacific Company for the same time was only 0.23 per cent of its total tonnage.

Claim is also made that the control which the Union Pacific Company acquired by the purchase of the Huntington stock suppressed free competition between them for the Oriental traffic. Many considerations arising out of the relations of the two roads to the trans-Pacific steamship lines which carried the traffic from the coast have conduced to the conclusion reached; but bearing in mind that we are not considering this case in view of the present Oriental traffic, but in view of what it was 10 years ago, when the transaction complained of occurred, we find adequate reason for it in the small amount of this business also. For the year ending January 30, 1901, the tonnage of the Southern Pacific in handling it was only 0.20 per cent of its total tonnage, while that of the Union Pacific both through San Francisco and Portland gateways was only 0.41 per cent of its total tonnage.

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The aggregate of all the business done by the Union Pacific and Southern Pacific Companies over all these routes for the years specified, which we believe fairly represent the general conditions prevailing at or before the Huntington stock was purchased, was for the Southern Pacific Company 0.88 per cent of the entire tonnage of that system, and for the Union Pacific Company 3.10 per cent of its aggregate tonnage. Tables in evidence also disclose that the total revenue derived from the traffic over these minor routes by the Southern Pacific Company for the year preceding the year of the Huntington purchase amounted to only 1.25 per cent of the total revenue of that system.

Certainly the desire to appropriate the trifling business done by the Southern Pacific Company on these minor lines, or to suppress a competition in traffic which was in the aggregate of such small proportions, could not have been the inspiration of the vast outlay involved in the purchase of the Huntington stock. Neither was the suppression of competition in this infinitesimally small proportion of the business of both companies a substantial or natural consequence of that important transaction. It did not amount to a direct and substantial restraint of either interstate or international commerce. It was at best only contingently, incidentally, and infinitesimally affected by it. This is not sufficient to bring it within the condemnation of the Anti-Trust law. *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300; *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142; *Northern Securities Co. v. United States*, *supra*; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428; *Phillips v. Iola Portland Cement Co.*, 61 C. C. A. 19, 125 Fed. 593; *Arkansas Brokerage Co. v. Dunn & Powell*, 97 C. C. A. 454, 173 Fed. 899; *United [117] States v. Standard Oil Company* (C. C.) 173 Fed. 177, and cases cited.

4. This concludes consideration of the effect of the transaction chiefly relied upon by the government in this case. But it is contended that the purchase by the Union Pacific of a controlling interest in the stock of the Northern Pacific

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Company was also violative of the Anti-Trust law. Without dwelling on the reason for the purchase of this stock, disclosed in the preceding statement of facts, it is sufficient to say that, if any controlling interest was thereby acquired, it was lost some time before this suit was instituted, and that none of that stock is now held by or for the Union Pacific Company. As there is no showing of any like ambitious project in this respect for the future, we fail to discover any opportunity or reason for the injunctive relief on this account.

5. The transaction of 1904, by which a syndicate of men interested in the Union Pacific Company purchased for their individual account \$30,000,000 in face value of the stock of the Santa Fe Company, and the investment in 1906 of \$10,000,000 by the Union Pacific in acquiring 5 per cent of that stock are not claimed to have conferred any actual power of control upon the Union Pacific over operations of the Santa Fe Company. The proof does not disclose that any such control was acquired or attempted to be exercised. Even if the motive of the purchasers was to gain some inside information concerning the operations of the great competitor of the Union Pacific Company, they chose an entirely lawful way for doing it, and their acts afford no reason for judicial condemnation.

6. Much of the argument relating to the construction of the San Pedro route is addressed to the proposition that, because the San Pedro line was not completed at the time the Huntington stock was purchased, and because there was no competition then existing between the roads in question, there could have been no contract, combination, or conspiracy in restraint of it. The contention of the government in this particular, that a contract to strangle a threatened competition by preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic, would be in violation of the Anti-Trust law, may well be conceded. *United States v. Patterson* (C. C.) 59 Fed. 280; *Interstate Com. Com. v. Philadelphia & R. Ry. Co.* (C. C.) 123 Fed. 969; *Thomsen v. Union Castle Mail S. S. Co.*, 92 C. C. A. 315, 166 Fed. 251; *Pennsylvania R.*

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Co. v. Commonwealth, 3 Sadler (Pa. Sup. Ct. Cases) 83, 91, 7 Atl. 374.

7. But this concession does not settle the question before us. The San Pedro line, as originally projected and as ultimately constructed, does not appear to have been naturally competitive with the Union Pacific, Southern Pacific, or any of the subsidiary lines. It is practically a continuation of the Union Pacific or Oregon Short Line southwardly, and, generally speaking, its course is at right angles, rather than parallel with, either the Union Pacific or Southern Pacific line. If it, as an existing route, had been acquired by the Union Pacific, it would have served rather as a short cut from Los Angeles to [118] Salt Lake City, to avoid the circuitous route between those points via San Francisco, than as a natural competitor for any of the business of that route. While it was calculated to deprive the Southern Pacific of a long haul on traffic destined between Los Angeles and Salt Lake City and beyond, it would be unfortunate indeed if that fact should have prevented its construction, especially when it was practically at right angles with the Southern line, and much shorter and much better adapted to serve the public. In these circumstances it, as projected and built, was not, in our opinion, naturally competitive with the Southern Pacific line, as alleged in the bill.

It is however, contended that in the adjustment of differences between the Union Pacific and its allied or subsidiary companies with the Clark interests, resulting in the construction of one line between Salt Lake City and Los Angeles, instead of two, as projected, there was a suppression of competition which would have existed between the two, if they had built separately. We, however, are unable to discover anything in the transaction except a laudable purpose to adjust differences and construct a line of railroad between the two points which would serve their joint interests as well as those of the public. The evidence discloses that it was not feasible to construct two lines of road over the only practicable route through the canyon in the mountains, known as "Meadow Valley Wash." This, with other reasons of a practical nature, fully justified the abandonment of the project

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of constructing two lines and the consolidation of them into one.

Some minor agreements fixing the relations between the new San Pedro line and the other lines composing the system of the Union Pacific, as well as the provisions for fixing through and local rates, were made; but these are so incidental to the main transaction, already found not to have violated the interstate commerce act, as to warrant no further consideration. If it be true, as already pointed out, that the San Pedro line was not naturally competitive with the Union Pacific or Southern Pacific lines, none of these incidental things would disturb legitimate competition within the purview of the Anti-Trust law.

The evidence discloses certain transactions between the Southern Pacific Company, on the one hand, and the Phoenix & Eastern and the California & Northwestern Railroad Companies, on the other hand, which are claimed to have been in restraint of competition between them; but as they affect local transportation only, and are not complained of in the bill as substantive wrongs, and as neither of the two last-mentioned companies are made parties to this action, it is not perceived how any independent relief with respect to them can be granted. We therefore refrain from considering them, except in so far as they afford relevant evidence on issues joined in the case.

8. Having now found that the several contracts or transactions specifically complained of in this case did not offend against the Anti-Trust law, it seems hardly necessary to discuss the claim, little debated by counsel, that they evidenced a combination or conspiracy to do so. In determining whether a combination or conspiracy in violation of the first section of the Anti-Trust Act, namely, to restrict competition and thereby restrain commerce, was entered into, the facts already [119] found may properly be supplemented by reference to actual consequences and results. These often reflect the original meaning and purpose of preceding transactions. The proof shows that after 1901, as well as before, the rates for trans-continental traffic were the same over both the Union Pacific and Southern Pacific lines, and that there

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has since then been with respect to either of these lines no impairment of service, no deterioration of the physical properties, no discontinuance of efforts to satisfy the public, and no complaints of shippers of any inferior or inadequate service.

The large number of initial carriers striving for that traffic have continued their active solicitation for business over the line which assured them the longest haul or otherwise benefited them most, and although some agents of the two roads, which before 1901 were separate, are now joint, they have continued to exercise their influence to secure business for either road according to its availability, and always in opposition to other active competitors, like the Santa Fe and Denver & Rio Grande roads. A substantial majority of the stock of the Southern Pacific Company has been held by parties other than the Union Pacific Company; but we fail to find any complaint by such holders of any discrimination against their road or of any failure to properly promote its welfare. None of the minor points charged to have been deprived of competitive opportunities by the Huntington purchase are shown to have suffered as a result of that purchase. On the contrary, hundreds of millions of dollars have since 1901 been expended on these roads. Their physical condition has been vastly improved, and their efficiency for public service as well as for private profit has been greatly enhanced. The whole proof, taken together, we think, fails to disclose any conspiracy to restrain interstate or foreign commerce, in violation of the first section of the act.

The same considerations lead to the conclusion that no combination or conspiracy to monopolize or attempt to monopolize trade or commerce among the states or with foreign nations was entered into. Moreover, the fact that the Union Pacific Company did not secure or undertake to secure the control of the Santa Fe road, a thoroughly sufficient, well-equipped, and powerful rival for trans-continental business, or the Denver & Rio Grande road, a potential, and later an actual, powerful rival for the same business, affords additional and conclusive evidence of no such combination or conspiracy. The purchase by the Union Pacific Company, soon

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after acquiring the Huntington stock, of a majority of the capital stock of the Northern Pacific Company, tends to the opposite conclusion; but, in view of the main reason for its acquisition and its disposition by the Union Pacific Company, we are indisposed to give to that purchase alone any considerable significance.

The conclusions of fact already stated dispose of this case without the necessity of determining the question, much debated in brief and argument, whether securing control of the Southern Pacific Company by purchasing stock of individual owners could in any view of the case have contravened the anti-trust law. On the facts of this case, with all their reasonable and fair inferences, we conclude that the government has failed to substantiate the averments of its bill.

[120] Mr. Justice VAN DEVANTER, while a Circuit Judge, participated in the hearing, deliberation, and conclusion in this case, and he now concurs in this opinion.

The bill must be dismissed, and a decree will be entered to that effect.

SANBORN, Circuit Judge, concurs.

HOOK, Circuit Judge (dissenting).

Briefly stated, the decision of the court, in which I am unable to concur, is that the Union Pacific and Southern Pacific Railroads, universally regarded as parallel in a broad geographical and legal sense, for about 2,000 miles, were not competitors in 1901 for trans-continental or other traffic, and therefore their merger in that year was not contrary to the Sherman Anti-Trust Act. I agree with the court upon the minor features of the case, including, in a general way, that of the control of the San Pedro line by the Union Pacific Company. The latter is much as if a railroad company, with a line from the west through Omaha or Kansas City to Chicago, should obtain control of a branch from Omaha or Kansas City to St. Louis. In the absence of a more direct competitive relation than appears here, the Sherman Act should not be held to cover such tangential acquisitions.

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But the chief complaint of the government is of an unlawful contract or combination in restraint of trade and commerce, by which the Union Pacific and Southern Pacific transportation systems are held under a single control, and competition between them is suppressed or destroyed. The combination was effected through the purchase by the Union Pacific of part of the capital stock of the Southern Pacific. Upon this two important questions arise. The first, which is one of law, is whether the purchase by one railroad company of corporate stock of another, less than the majority, but sufficient in amount according to the practical experience of men to enable the purchaser to dominate or control the policies and operations of the other, is a form of combination within the prohibitions of the Sherman Act. The conclusion of the court being against the government on another ground, it was unnecessary to determine this question; but as I do not assent to the conclusion, and as the question lies at the threshold of the government's case, I should briefly express my view concerning it.

There is no substantial difference between the holding of the corporate stocks of two companies by a third, such as was condemned in the *Northern Securities case*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and the holding by one of those two of the stock of the other. The form is somewhat different, but the effect, which is the chief concern of the law, is the same. If prior competition disappears as a direct and natural result, trade and commerce are restrained. If it is unlawful in the one case, it must be so in the other. It would be idle to hold that, while two competing railroad companies cannot lawfully submit to a common control through a separate stockholding organization, they may do so by dispensing with that medium. That would be regarding shadows and letting the substance go. The [121] language of the Sherman Act in this particular is broad. It covers every contract and combination in restraint of interstate and foreign trade or commerce, *whether in the form of trust or otherwise*. The essential, effective character of the arrangement is to be regarded, rather than its casual vestiture; the substance, rather than the form. In *Harriman v.*

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Northern Securities Co., 197 U. S. 244, 297, 25 Sup. Ct. 493, 49 L. Ed. 739, it was assumed that the act could be violated by the direct holding of stock of a competing corporation.

I grant it is a serious thing to disturb a great business transaction like that shown in the case at bar; but, given the power of Congress to legislate, and clear words to express what a judge conceives to have been its purpose, his duty is plain, whatever he may think of the wisdom of the law. Even if public regulation is believed to be a wiser solution of the important economic problem than enforced competition, with its necessary wastes and burdens, nevertheless his judgment of a law embodying the latter policy should proceed as with distinct approval of its selection. It is quite clear that, with the growth and development of governmental regulation of common carriers engaged in interstate commerce, there is decreasing reason for holding them subject to the Sherman Act, and it may be that as regards rates of transportation the Interstate Commerce Commission could perform its duties with equal justice to the public and greater justice to the railroads if they were released. But certainly that is for Congress, not the courts. The judicial function is properly exercised when the Sherman Act is construed and applied as though it were the only legislative remedy on the statute books.

The other question in the case is decided by the court against the government. It is whether the two great transportation systems, the Union Pacific and the Southern Pacific, were in a substantial sense competitors in interstate and foreign commerce. This question involves the relative location of their lines on land and sea, and not only the parts they actually performed, but also those they were naturally capable of performing, in the movement of traffic. Albeit in part within the domain of judicial knowledge, this seems to me to be a pure question of fact. Some hundreds of witnesses, practical railroad men and shippers of wide experience, testified upon it, and a great mass of evidence was taken, showing almost without dispute that, using the term "competition" as business men understand and use it, there was active, vigorous, and substantial competition between

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the Union Pacific and the Southern Pacific before the former obtained control of the latter. But the court holds the question of competition to be one of mixed law and fact, not determinable by the evidence alone, and as such it is answered against the government.

Roughly stated, the situation was this: In 1901, when the stock purchase was made, the Union Pacific had lines of railroad from the Missouri River, at Council Bluffs, Iowa, and Kansas City, Mo., to Cheyenne, Wyo.; thence a line through Ogden, Utah, to Portland, Or., lines of steamers from Portland to San Francisco, Cal., and from San Francisco and Portland to Oriental ports; also certain rights under an act of Congress (13 Stat. 356) with respect to the Central Pacific Railroad, which was controlled by the Southern Pacific, from [122] Ogden to San Francisco. At the Missouri River the Union Pacific had many connections with the principal cities of the country and the Atlantic seaboard by the roads of other companies directly interested in routing west-bound traffic by its line as against the Sunset Route, so-called, of the Southern Pacific. On the other hand, the Southern Pacific had a steamship line from New York to New Orleans, La., thence a railroad to Southern California and up through San Francisco to Portland, the above-mentioned railroad from Ogden to San Francisco, a steamship line from San Francisco to the Orient, and a steamship line from San Francisco to Panama, being the Pacific link of the Panama rail and water route from New York to San Francisco. The Southern Pacific also had at New Orleans connections similar to those of the Union Pacific by the roads of other companies directly interested in routing west-bound traffic by its line as against that of the Union Pacific. The most important competition, so termed by railroad men and shippers, between the two companies, was for trans-continental business. There was also active competition at intermediate points, where considerable traffic originated. The two companies were distinct in control, management, and operation, with separate officers, directors, traffic and operating officials, commercial agencies, and soliciting agents. Since the combination common officers and directors of traffic and operation were elected or appointed, competitive com-

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mercial agencies were consolidated or abolished, the activities of the two systems have been in close harmony, not in rivalry, and competition has disappeared.

Reduced to the simplest terms the conclusion of the court that the two companies were not competitors and the Sherman Act was not violated is based on these two grounds: (1) Trade and commerce were not restrained, because before the combination the competitive interstate and foreign traffic of the two railroad companies was not a substantial percentage of their total traffic, including in such total the traffic entirely within the several states, over which Congress had no control. (2) Trade and commerce were not restrained because before the combination one of the lines of railroad, the Union Pacific, was an intermediate one in a through route, and depended for competitive traffic upon the business interests of connecting carriers, and therefore could not by itself alone, unaided by the concurrence of its natural allies, make a joint through rate over the entire route. In other words, each party to a contract or combination between railroad companies, which the government assails as being contrary to the Sherman Act, must have owned or controlled an entire through route over which competitive traffic moved. That it may have performed an essential part, or have been a necessary factor, in the transportation, is insufficient. That connecting carriers may have voluntarily joined it in making through rates for the traffic is immaterial.

With the greatest deference to my brothers, I am so profoundly impressed with the conviction that these conditions are without substantial relevance to the question before us that I am constrained to dissent from the opinion of the court. Moreover, their introduction so greatly narrows the act of Congress, which, however it may be [123] regarded, is the law of the land, that very little is left of it when applied to railroads. *Under one or both of those tests, the Union Pacific could probably have lawfully purchased control of all the great parallel railroad systems in the United States.* It could doubtless have been shown in most instances that the interstate and foreign traffic of each, for which it competed with the Union Pacific or with any of the

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others, was but a small percentage of its total traffic of all kinds, and we know that all of them depended upon connecting lines at least for trans-continental and much other traffic, and could not, unaided, have made joint through rates with respect to it. Nor is it clear that what could have been done in 1901 might not as well be done to-day. It is suggested that by the passage of the Hepburn Act (June 29, 1906) Congress empowered the Interstate Commerce Commission to prescribe through routes and joint rates where connecting carriers have refused, and therefore a different rule respecting competition has since prevailed. I am wholly unable to perceive the material pertinence of that act, much less its controlling effect. The matter of compulsory joint rates is purely adventitious, except as business may be facilitated over a combined route. A joint through rate merely implies a single charge, less than the aggregate of the locals, for a continuity of transportation over two or more connecting lines. Carriers always had the power to make such rates, and commonly did so with allies of their own selection; but whether the traffic movement was under joint rates or combinations of local rates does not seem to me to determine the existence or non-existence of competition. If rival lines or routes contended for the traffic, and it moved, by single line or by combination of connecting lines, there was competition. If not, it must be that until 1906, when the Hepburn Act was passed, the Southern Pacific, with its through water and rail route from New York to San Francisco, never had a competitor for trans-continental traffic in any of the great railroad systems in the United States or in all combined.

The traffic for which the Union Pacific and Southern Pacific competed in 1901, and which one or the other secured, was of enormous volume when considered by itself. It ran into millions of dollars, and with the natural development of the country and the growth of commerce, reasonably to have been foreseen, it has since then greatly increased. The competition was direct, not incidental, and the business for which they strove was appreciable or substantial, not insignificant. But tables of figures are given by defendants from which it appears that the interstate and foreign traffic between com-

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petitive points secured by each was but a small percentage of the tonnage of its entire system, and it is therefore argued that the competition to which the act of Congress applies was relatively so small there could have been no restraint or suppression in a substantial sense, and hence no intent to restrain or suppress it. The comparisons being with the total tonnage of the railroads, obviously an element is included which is wholly beyond the power of Congress, namely, the traffic local to the states. The logical conclusion from this view must be that the Sherman Act is not violated whenever the trade or commerce within its operation, affected by the contract or combination, however great in [124] volume, is overshadowed by that exclusively within the jurisdiction of the states. In other words, though substantial competition in interstate or foreign commerce has been actually suppressed, it must be held there was no intention to suppress it. The magnitude of the traffic shown by the proofs was too great, and the competition for it too earnest and active, to dismiss it as merely incidental to the principal business of the companies, and as not furnishing a motive for the merger or combination. A contention somewhat similar was made by defendants in the *Northern Securities case*. It was there argued (193 U. S. 261, 262, 24 Sup. Ct. 436, 48 L. Ed. 679) that the entire interstate commerce of the two railroads, the Great Northern and the Northern Pacific, the rates on which could be controlled by them without other competition or consent of connecting lines, was less than 3 per cent of their total interstate commerce, and that the restraint could not in any event affect more than that per cent of their commerce of that character. The argument, however, was without avail.

In a broad and substantial sense, in the sense in which the terms are used in constitutions and statutes and in railroad and business circles, the Union Pacific and Southern Pacific lines were parallel and competing. That they were so regarded by practical men having to do with transportation in its various phases is shown, I think, by an overwhelming mass of evidence. But, had no witness testified regarding it, we should come to the same conclusion. There are occasions

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when courts in the exercise of their judicial functions are entitled to look out into the world of affairs to observe whether there is not a common knowledge of the subject before them, so universal and pervading as not to admit of testimonial controversy. That is termed "judicial notice," and it proceeds upon the assumption that a judge should not be blind to what all others see and understand. It embraces the great currents of trade and commerce in his country—the general movements of products and manufactures—as completely as it does the important features of its physical geography, the location of the cities, the ports, the navigable waters, and the lines of railroad.

The question whether a combination of two transportation lines is contrary to the Sherman Act is not always to be reduced to a close consideration of the number of tons of competitive freight they carried within a given period, much less the precise relation of the competitive tonnage to their total business of all kinds. Were they, at the time of the combination, in a substantial degree competitive factors in interstate and foreign commerce? Were they so laid upon land and sea as inherently to possess a substantial competitive capacity for the movement of such traffic? It is not merely the extent to which that capacity was utilized yesterday, but the extent to which the transportation facilities were naturally capable of being utilized; and reasonable, not speculative, regard should be had for the developments of to-morrow. Were it otherwise, Congress in the making of laws would be denied that ordinary foresight which men engaged in business commonly possess and practice. Competition, as the antithesis of monopoly, is the influence which those in the same line of business have on each other, and that influence may as well be manifested in [125] an existing capacity and preparedness as in the degree of active exercise. A moment's reflection will show this is old doctrine in the judicial construction and application of laws against monopolies and restraint of trade. A railroad company may have great, if not controlling, influence on competition, regardless of the amount of the traffic it actually carries at the time. With a line of railroad scarcely less permanent than a navigable

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waterway, it stands equipped and ready to do the business when conditions arise, and the duty to do it comes from the very character of its corporate being and the source of its powers and franchises. It may at once be both a curb and a spur to other lines—a curb as regards rates, and a spur as regards quality of service, which are the two great points at which transportation touches the public interest. The influence of the Mississippi River and its navigable tributaries upon the trade and commerce of St. Louis is well known, yet of the enormous freight tonnage into and out of that city, largely interstate, scarcely one-half of 1 per cent moves by water. To be more exact, of the total rail and river traffic in 1910, nearly 52,000,000 tons, but thirty-six hundredths of 1 per cent, was transported by water; in 1909, but sixty-seven hundredths of 1 per cent of that year's tonnage. But who would contend that if the rivers were the subject of private ownership, instead of being common highways for the use of all, their control by a railroad company could not restrain trade or commerce because, as measured by relative percentages, the competition appeared to be so slight?

When the argument was made at the hearing that, because the Union Pacific was an intermediate, not a through line, it was not a competitor for traffic moving over it and its connections for which it could not have made a joint through rate, counsel admitted that the rule contended for would have made it lawful under the Sherman Act for all intermediate lines in trans-continental transportation such as the Chicago, Rock Island & Pacific from Chicago to El Paso, the Atchison, Topeka & Santa Fé from Chicago to Mojave (before it gained entrance to San Francisco), the Missouri, Kansas & Texas from St. Louis and Kansas City to Texas points, the St. Louis & San Francisco from St. Louis and Kansas City to the Southwest, the Missouri Pacific with the Denver & Rio Grande from St. Louis to Ogden, and the Union Pacific to have combined and agreed among themselves, as was done in the *Trans-Missouri Freight Association case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, if they confined their combination to trans-continental traffic; in other words that those intermediate railroads could not be competitors for the traf-

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fic, and a confederation with respect thereto could not be unlawful. It seems to me that a statement of the contention shows its unsoundness. Anything that affects the rate over a substantial part of a transportation route is calculated to affect the charge as an entirety; and so of the other features of railroad competition. The competition of the all-water route by the Atlantic and Pacific Oceans with the all-rail trans-continental routes in the United States is so fully recognized that it is safe to say almost every car load rate to the Pacific coast from the territory between the Missouri river and the Atlantic seaboard exhibits a recognition of its influence. And yet it is contended that the [126] Union Pacific in the direct line of traffic movement, with 1,000 miles of railroad from the Missouri River to Ogden, and nearly 900 miles thence to Portland, with its steamship lines, is not a competitor for transcontinental traffic.

The practical aspect of the question is shown by the cases in which railroad companies have asserted the existence of competition from rival lines or routes of transportation as evidencing conditions justifying discriminations and preferences under the interstate commerce act—that the rates objected to as discriminative *were controlled by competition*, and if they abandoned the rates they would lose the business. An instance of this appears in *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940. The Texas & Pacific Railroad from New Orleans to El Paso, Tex., and the Southern Pacific Railroad thence to San Francisco, formed a through route over which traffic, both foreign and domestic, moved. The Texas & Pacific Company successfully defended its right to charge and receive more for its proportion of the through rate on traffic originating in New Orleans than it charged and received on import traffic originating in London and Liverpool and billed through New Orleans over the same route to San Francisco, and it did so on the ground asserted that the rate from the English cities to San Francisco was determined by competition with the following routes: By vessel around the Horn; by vessel and by rail across the Isthmus

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of Panama; and (162 U. S. 216, 16 Sup. Ct. 674, 40 L. Ed. 946) by vessel and by rail across Canada. Were all those transportation agencies subject to the laws of the United States, could it with reason be urged that a contract or combination between them, suppressing a competition which actually existed, would not contravene the Sherman Act, because all but one of them were composed of connecting links severally owned or controlled? If that which men engaged in transportation recognize as substantial competition in shaping their policies and their conduct is not so regarded in the courts, the statute will not have the operation intended by its enactment. Laws are generally framed to apply to the everyday affairs of men, who are not given to the study of nice differences and distinctions, and that should always be borne in mind in determining their meaning.

But it is said there was no competition, because the Union Pacific depended upon the Southern Pacific line from Ogden to San Francisco. It is true that much of the transcontinental traffic of the Union Pacific went that way; but it is not unusual for railroad systems to connect at points and interchange business, though they are active competitors in other respects. In fact, a large proportion of them are so related. Competition, within the laws which seek to preserve it, does not imply absolute non-intercourse, as between hostile armies, which exchange no prisoners and give no quarter. Moreover, the use of the Ogden line was neither a necessity to the Union Pacific nor a pure favor or concession by the Southern Pacific. Aside from the mutual benefits from the interchange of traffic, the former had its own line from Ogden, by way of Portland, which, though not as desirable, was more than an important strategic advantage necessary to be reckoned with. But were all this otherwise, the undeniable fact remains, [127] after stripping the case of all debatable considerations, that the Union Pacific secured this west-bound traffic by active competition, and had transported it as competitive for 1,000 miles before it reached Ogden.

I think that upon the main feature of the case the government is entitled to a decree.

Syllabus

UNITED STATES v. E. I. DU PONT DE NEMOURS & CO. ET AL.

(Circuit Court D. Delaware. June 21, 1911.)

[188 Fed. Rep., 127.]

MONOPOLIES (§ 24)—ANTI-TRUST ACT—SUIT FOR INJUNCTION.—A member of a combination in restraint of interstate commerce, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), who has in good faith withdrawn from such combination, is not subject to a suit for injunction under section 4 of the act; nor, if such member is a corporation, is the fact that a minority part of its stock is owned by members of the combination sufficient to sustain such a suit, in the absence of proof that such ownership is employed to aid the combination.*

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.]

MONOPOLIES (§ 24) — ANTI-TRUST ACT — INJUNCTION.—A minority stockholder in a corporation, who is not an officer and takes no part in the management of its business, is not subject to a suit for injunction under Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat., 209 (U. S. Comp. St. 1901, p. 3201), because the corporation may be a party to a contract or combination to restrain or monopolize interstate commerce.

[Ed. Note.—For other cases, see Monopolies Dec. Dig. § 24.]

MONOPOLIES (§ 20)—ANTI-TRUST ACT—CONSTRUCTION.—"COMBINATION IN RESTRAINT OF TRADE."—The provisions of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), making unlawful any combination "in restraint of trade or commerce among the several states" or to monopolize any part of such trade or commerce, do not make every combination in restraint of competition in interstate trade unlawful, but there may be a restraint of competition that does not amount to a restraint of trade within the meaning of the act. On the other hand, a combination cannot escape the condemnation of the act merely because of the form it assumes, and a single corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with such corporation, puts a restraint on interstate commerce, and monopolizes or attempts to monopolize a part of such commerce, in a sense that violates the act.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276; vol. 8, p. 7606.]

* Syllabus copyrighted, 1911, by West Publishing Company.

Syllabus.

MONOPOLIES (§ 20)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.—In 1872 seven of the largest manufacturers of powder and other explosives in the United States organized what was called the "Gunpowder Trade Association," which, at its meetings and through committees, fixed prices which the constituent members were required to observe under penalty of fines. It also apportioned territory between its members, authorized the cutting of prices in particular localities in order to drive competitors out of the market or force them to come into the association, and apportioned the losses, if any, from such price cutting, between the members. Subsequently other companies were taken into the association, until there were 17 members; and it was continued with some changes in the [128] fundamental agreement, but none in its purposes or methods, until 1902. At that time E. I. du Pont de Nemours & Co., then the most influential member of the association, passed under a new management, was reorganized into the E. I. du Pont de Nemours Company, and its controlling stockholders and officers inaugurated the policy of acquiring the assets of other corporations and vesting ownership of their plants and the control of their business in their own company. So successfully was this policy carried out, by the use of the methods of the association, that within five years such company had acquired the stock of and caused to be dissolved 64 corporations engaged in the manufacture of powder and other explosives, and controlled from 64 to 100 per cent of the trade of the United States in the different kinds of explosives sold, and also, directly or through subsidiary corporations, as stockholders, controlled all of the other members of the association which was then dissolved. *Held*, that the formation of such a corporation and its subsidiaries and the adoption of the new policy was merely the continuance in a different form of the illegal association, and that it constituted a combination in restraint of interstate commerce and to monopolize a part of the same, which was unlawful under Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.]

MONOPOLIES (§ 26)—SUIT TO RESTRAIN UNDER ANTI-TRUST ACT—RELIEF.—Where an existing combination in corporate form has been adjudged unlawful, as in violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and to have monopolized and to be monopolizing a large part of the interstate trade in a particular commodity, it is the duty of the court, under the power conferred by section 4 of the act to "prevent and restrain" its violation, not only to enjoin further violation of the act, but to render its decree effective by dissolving the illegal combination.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 26.]

MONOPOLIES (§ 24)—SUIT FOR INJUNCTION UNDER ANTI-TRUST ACT—PARTIES.—To a suit under Anti-Trust Act July 2, 1890, c. 647, § 4,

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26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), to restrain violation of the act by corporations alleged to constitute a combination in restraint of or to monopolize interstate commerce, mortgagees of such corporations are not necessary parties, but may be brought in if it appears that their interests will be affected by the decree.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.]

In Equity. Suit by the United States against E. I. du Pont de Nemours & Co. and others. Decree of dismissal as to certain defendants, and for the United States as to all others.

John P. Nields, U. S. Atty., *George W. Wickersham*, Atty. Gen., *William S. Kenyon*, Asst. Atty. Gen., and *James Scarlet*, and *William A. Glasgow, Jr.*, Sp. Asst. Attys. Gen., for the United States.

Frederic Ullmann, for defendants American Powder Mills, Miami Powder Co., and Ætna Powder Co.

M. B. and H. H. Johnson, for defendant Austin Powder Co.

Frederick Seymour, for defendant Equitable Powder Mfg. Co.

David T. Marvel and *David T. Watson*, for defendant Henry A. du Pont.

Burton B. Tuttle, for defendant King Powder Co.

John C. Spooner, *James M. Townsend*, *George S. Graham*, *William S. Hilles*, and *William H. Button*, for remaining defendants.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

[129] LANNING, Circuit Judge.

This is a suit in equity instituted by the United States under the Sherman Anti-Trust Act against 43 corporate and individual defendants for the purpose of obtaining a decree adjudging the defendants guilty of maintaining a combination or conspiracy in restraint of interstate commerce and of

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monopolizing or attempting to monopolize such commerce, or a part thereof, and awarding an injunction to prevent and restrain further violations of the act. Thirty-six answers have been filed by 41 of the defendants. Two of the defendants—Austin Powder Company and Metropolitan Powder Company—have filed no answers. The petition and answers fill a volume of over 500 pages. We do not deem it necessary to present a detailed statement of the facts alleged in the pleadings. The petition is so admirably framed and the answers meet the allegations of the petition so fairly that there is no difficulty in determining the issues of fact or of law. Then, too, while the proofs fill a dozen volumes, we have had such valuable aid from counsel in their briefs and their oral arguments that we have easily reached the conclusion that there is no serious controversy as to the essential facts.

The case, as we view it, is to be decided upon evidence about which there is practically no dispute. Our task is by a study of unimpeached documentary and other evidence to ascertain (1) what were the relations of the defendants when this suit was commenced; (2) whether those relations are inimical to the law; and, if so, (3) what the relief shall be. That task will be simplified if, in the first place, we determine which of the defendants are clearly shown to have had no connection at the time of the commencement of this suit with any combination or conspiracy of the nature described in the petition; for, as the only relief we can grant in this proceeding is injunctive, the petition must be dismissed as to any defendant who was not violating the law, or threatening to violate it, when the suit was commenced. One may be indicted for a former connection with a combination or conspiracy violative of the Anti-Trust Act; but, after he has in good faith withdrawn from such a combination or conspiracy, he is no longer a subject of the injunctive power of a court of equity.

Ætna Powder Company of Indiana, Miami Powder Company of Ohio, and American Powder Mills of Massachusetts have filed a joint and several answer, in which they deny that they were parties to any of the agreements mentioned in the petition when this suit was commenced, and aver that,

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at the time of the commencement of the suit, none of them had any shares of capital stock or other interest in any of the other defendant companies; that, as between themselves, they were not competitors, since one of them was a manufacturer of gunpowder for sporting purposes only, another of black powder for blasting purposes only, and the remaining one of dynamite and fuses only; and that they have not sold and do not sell any of their commodities at prices fixed or dictated by any of the other defendants. The proofs amply support the averments of the answer, and establish the fact to be that, although all of these companies did in former years enter with others of the defendants into certain trade agreements to be more [130] particularly referred to hereafter, they withdrew therefrom in 1906, and that for at least seven months before the commencement of this suit none of them had any connection, direct or indirect with any of the alleged unlawful combinations set forth in the petition.

It is charged that the Equitable Powder Manufacturing Company was incorporated in January, 1892; that E. I. du Pont de Nemours & Co., a partnership then existing in Delaware, acquired 49 per cent of its capital stock; that the stock is now held by one of the defendants; that shortly after its incorporation the Equitable constructed a powder mill in Illinois, where it has ever since manufactured and sold in interstate trade gunpowder and other high explosives; that ever since its organization competition in the shipment and sale of gunpowder and other explosives between that company and others of the defendants has been suppressed and eliminated; that the prices for its commodities have been fixed by the parties to the alleged combination; that E. I. du Pont de Nemours & Co., the partnership referred to, and its successors, have ever since dominated and controlled the Equitable by virtue of the ownership of 49 per cent of its capital stock; and that the Equitable has been and now is a party to the alleged combination. The answer of the Equitable admits that the partnership referred to purchased 49 per cent of its capital stock, but says the purchase was made from certain of its stockholders four years after its incorporation, and denies that it was a party to the pur-

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chase, or that competition between it and other parties had been suppressed or eliminated, or that its prices have been fixed by any other parties to this proceeding, or that its business has been dominated or controlled by the partnership referred to or its successors, or that it has been, or is, a party to any combination or conspiracy. It also avers that it has not been a member of any trade association since July 1, 1903, that it is not, and for a long time before the commencement of this proceeding had not been, a stockholder in any other powder company, and that its business has long been carried on in competition with that of the other defendants and other manufacturers and vendors of black gunpowder and black blasting powder. The evidence of Mr. F. W. Olin, the president of the Equitable, who was called as a witness for the government, establishes the truth of the averments of the answer. There is no doubt that the Equitable withdrew from the Gunpowder Trade Association four years before this suit was commenced, and that it now has no connection whatever with any combination of vendors of explosives. It is true that 490 of its 1,000 shares of capital stock are owned by one or more of the defendant companies; but the averment of the government's petition that the business of the Equitable is dominated and controlled by any combination is not shown to be the fact. A business is not necessarily controlled by the mere purchase of a minority interest in it; nor is there any proof that the Equitable has at any time since July 1, 1903, directly or indirectly aided any of the defendants in efforts to control the trade in explosives, or submitted or been subjected to external coercion of any kind. We are not at liberty, by the extraordinary writ of injunction, to interfere with the ownership of the 490 shares of the Equitable, in the [131] absence of proof that that ownership is employed to aid the combination described in the government's petition.

Previous to 1897 Austin Powder Company, of Cleveland, Ohio, was a party to several contracts alleged by the United States to have been violative of the Anti-Trust Act; but the only fact affecting that company, alleged in the petition or proved, that existed at the commencement of this suit, is the

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ownership by one of the other defendant corporations of 266 of the 800 shares of its capital stock. There is no proof that the ownership of this minority interest in the capital stock of the Austin has been used for any unlawful purpose. While the Austin has filed no answer, it appears that, by an agreement with counsel for the government, it reserved the right to move to dismiss the petition as to it.

King Powder Company, of Cincinnati, Ohio, Marcellus Powder Company, of Marcellus, N. Y., and Ohio Powder Company, of Youngstown, Ohio, were incorporated in 1878 and 1881. They erected mills in New York and Ohio, and it is charged that members of the Gunpowder Trade Association waged against them such a destructive warfare that between 1883 and 1886 the prices of explosives within their fields of competition were reduced below the cost of manufacture, that the owners of the capital stocks of the Marcellus and the Ohio companies were compelled to sell their stocks to certain members of the Gunpowder Trade Association, that those two companies were subsequently dissolved, and that King Powder Company was forced into an agreement by which its business was controlled by the Gunpowder Trade Association, which association was formed under an agreement dated April 29, 1872, and continued under other agreements dated August 23, 1886, December 19, 1889, and July 1, 1896. King Powder Company was a party to all these agreements, but we need not here consider their effect, since it conclusively appears that on September 5, 1898, it refused longer to adhere to any "schedule on paper," and declared it should thereafter be guided "by the market price set by our competitors." It appears, also, that on January 29, 1901, King Powder Company entered into a contract by which it agreed to sell to E. I. du Pont de Nemours & Co. of 1899 (a corporation of Delaware which succeeded the partnership of the same name) and Laffin & Rand Powder Company the whole of its output, except what should be used by a certain other company, for the period of 25 years; and it is charged that in April, 1901, these two vendees caused King Mercantile Company to be organized, acquired a majority of its capital stock, and used it as an in-

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instrumentality for controlling the output of King Powder Company and eliminating the latter company as a competitor. But it is also unnecessary to inquire into the legality of these transactions, for on December 21, 1906, the agreement of January 29, 1901, was formally rescinded by mutual consent of all the interested parties. There is no proof that King Powder Company, after December 21, 1906, was a party to any trade agreement concerning the manufacture or sale of gunpowder or other explosives. On the contrary, the uncontradicted proof is that for seven months before this suit was commenced King Powder Company was [132] absolutely independent in the conduct of its business, and during that time neither did anything, nor threatened to do anything, in any wise violative of the Anti-Trust Act.

The plant of Anthony Powder Company, Limited, a partnership association of Michigan, was destroyed in 1906 by an explosion. On June 26, 1907, it issued a call for a stockholders' meeting to convene on July 30, 1907, for the purpose of considering the question of dissolving the association and distributing its assets. On the date last mentioned a resolution to dissolve was adopted. The proceedings to dissolve were in progress when this suit was commenced. It was then doing no business, but was proceeding according to law to wind up its affairs.

The American E. C. & Schultze Gunpowder Company, a corporation of Great Britain, had established, prior to November, 1908, at Oakland, N. J., a plant where it was manufacturing and selling smokeless sporting powder. On November 9, 1908, by a written instrument, it leased its plant to E. I. du Pont de Nemours Powder Company of Delaware for 99 years, at an annual rental of £3,750. sterling, with an option of purchase to the lessee. In 1906 the lease was assigned to the E. I. du Pont de Nemours Powder Company of New Jersey (incorporated under the laws of New Jersey in 1903), which company has elected to purchase the plant, and has already paid a part of the purchase money therefor. We find nothing in these facts, so far as the British company is concerned, violative of the Anti-Trust Act.

The Peyton Chemical Company, a corporation of California, does not appear to have been, at the time of the com-

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commencement of this suit or at any other time, engaged in manufacturing or selling explosives of any kind, or to have taken any part in fixing the prices of explosives, or had connection with any scheme for controlling any part of the trade in explosives. It does appear that 3,000 of its 6,350 shares of stock are owned by one of the principal defendants, but that alone is insufficient to warrant injunctive relief as against Peyton Chemical Company.

Henry A. du Pont is one of the individual defendants. Previous to 1902 he had frequently represented E. I. du Pont de Nemours & Co. at the meetings of the Gunpowder Trade Association. In 1902 he sold the major part of his interest in that company to other members of the du Pont family, though he acted for a time thereafter as an officer of two of the du Pont corporations. In June, 1906, more than a year before this suit was begun, he resigned all his official positions in the defendant corporations, and since that time has had neither real nor nominal connection with the management of any of the defendant corporations, or with any trade agreement or combination concerning the manufacture or sale of explosives of any kind. His stockholdings in the defendant corporation, after February, 1902, were comparatively small, and as, after June 8, 1906, he was not a director or officer in any of them, and took no part in the management of any of them, he cannot be held individually responsible for the unlawful acts, if any there were, of any corporation of which he was a stockholder. It was impossible for him alone to dominate the busi[123]ness of any of the defendant corporations. There is no evidence that he attempted to do so, or that, after June 8, 1906, he had any connection, direct or indirect, with the shaping of policies or the management of the business of any of them. At the time of commencing this suit he was doing nothing, nor was he threatening to do anything, which furnishes the subject-matter of injunctive relief as against him.

Henry F. Baldwin is another individual defendant, who, it is alleged by the United States, was, at the time of the filing of the petition, a director of one of the du Pont companies and one of the managers of its business. By his an-

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swer Baldwin avers that he was a director of the company mentioned for some time previous to June 14, 1907, but that on that day he resigned, and has not since been a director of, or in any way interested in the management or control of, any of the defendant corporations. There is no proof that his answer is incorrect, or that any injunction should be granted as against him.

Before this suit was commenced the capital stocks and properties of other defendant corporations had been acquired by one of the du Pont companies, and they had been dissolved and were no longer in existence. These were the California Powder Works of California, the proceedings to dissolve which were practically completed when this suit was commenced; the Conemaugh Powder Company of Pennsylvania, dissolved April 30, 1906; the Metropolitan Powder Company of California, which has filed no answer and was dissolved September 21, 1905; and the E. I. du Pont Company, incorporated August 1, 1903, under the laws of Delaware, and dissolved July 1, 1907.

For the reasons stated, we think it is clear that the petition should be dismissed as to the following fifteen defendants: *Ætna Powder Company*, *Miami Powder Company*, *American Powder Mills*, *Equitable Powder Manufacturing Company*, *Austin Powder Company*, *King Powder Company*, *Anthony Powder Company, Limited*, *American E. C. & Schultze Gunpowder Company*, *Peyton Chemical Company*, *Henry A. du Pont*, *Henry F. Baldwin*, *California Powder Works*, *Conemaugh Powder Company*, *Metropolitan Powder Company*, and *E. I. du Pont Company of August 1, 1903*.

The remaining defendants are: (1) *Hazard Powder Company*, a corporation of Connecticut; (2) *Lafin & Rand Powder Company*, a corporation of New York; (3) *Eastern Dynamite Company*, a corporation of New Jersey; (4) *Fairmont Powder Company*, a corporation of West Virginia; (5) *International Smokeless Powder & Chemical Company*, a corporation of New Jersey; (6) *Judson Dynamite & Powder Company*, a corporation of California; (7) *Delaware Securities Company*, incorporated September 20, 1902, under

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the laws of Delaware; (8) Delaware Investment Company, incorporated September 20, 1902, under the laws of Delaware; (9) California Investment Company, incorporated April 7, 1903, under the laws of Delaware; (10) E. I. du Pont de Nemours & Co. of Pennsylvania, incorporated September 11, 1903, under the laws of Pennsylvania; (11) du Pont International Powder Company, incorporated December 14, 1903, under the laws of Delaware; (12) E. I. du Pont [184] de Nemours Powder Company, incorporated May 19, 1903, under the laws of New Jersey; (13) E. I. du Pont de Nemours & Co., incorporated February 26, 1902, under the laws of Delaware; (14) Thomas Coleman du Pont; (15) Pierre S. du Pont; (16) Alexis I. du Pont; (17) Alfred I. du Pont; (18) Eugene du Pont; (19) Eugene E. du Pont; (20) Henry F. du Pont; (21) Irene du Pont; (22) Francis I. du Pont; (23) Victor du Pont, Jr.; (24) Jonathan A. Haskell; (25) Arthur J. Moxham; (26) Hamilton M. Barksdale; (27) Edmond G. Backner; and (28) Frank L. Connable.

By its petition the United States considered the combination which it alleges the defendants have maintained with reference to six periods, extending from the year 1872 until the commencement of this suit. We shall consider it with reference to two periods, the first extending from 1872 to February, 1902, and the second from February, 1902, to the commencement of this suit, which was July 30, 1907. We make this division for the reason that in February, 1902, as we shall presently see, there was a very important change in the management of the companies in which the du Pont family had been and then was interested. Tracing the history of interstate commerce in gunpowder and other explosives through these two periods, we shall be able to answer the first of the three questions before us, which is:

1, 2. First. *What were the relations of the 28 defendants last above named when this suit was commenced?*

Much of the first of the two periods antedates July 2, 1890, when the Anti-Trust Act became a law. We are not debarred, however, from considering the methods by which interstate commerce in explosives may have been controlled before the enactment of that law, for it may be that an examination of

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those methods will disclose facts which will materially aid us in determining the purpose of the trade agreements and the incorporations that followed the enactment of the law and the real relations of the defendants when this suit was commenced. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, decided May 15, 1911. We shall, therefore, in the first place, sketch as briefly as clarity of statement will permit, the history of the interstate commerce in explosives from 1872 to February, 1902.

On April 29, 1872, at a meeting of manufacturers of gunpowder in New York City, there was organized the "Gunpowder Trade Association." Its members, seven in number, were Hazard Powder Company of Connecticut, Laffin & Rand Powder Company of New York, E. I. du Pont de Nemours & Co. (a partnership then existing in Delaware), Oriental Powder Mills of Maine, Austin Powder Company of Ohio, American Powder Company of Massachusetts, and Miami Powder Company of Ohio. Articles of association were adopted providing that the association should be composed of all manufacturers of gunpowder in the United States who were then or might thereafter be admitted thereto; that of its seven members the Hazard Company, the Laffin & Rand Company, and the du Pont partnership should at all meetings of the association be entitled each to ten votes, the Oriental [185] to six votes, and each of the other three companies to three votes; that the association should meet quarterly for the purpose of establishing prices, if need be, and hearing and deciding appeals, and determining all questions relative to the trade that might be submitted to it; that a council of five persons should be elected; that the council should meet weekly for the consideration and decision of infractions of agreements and questions of discrepancy and deviations from prices in the different home markets; that appeals from the council should be determined and the minimum prices for powder of the various sorts should be fixed by the association; and that funds necessary for carrying out the provisions of the articles should be assessed in proportion to the votes to which the members, under the terms of the articles, were respectively entitled.

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On February 11, 1875, at a regular quarterly meeting of the Gunpowder Trade Association in New York City, representatives of all seven of its members being present, a committee was appointed to consult with the California Powder Works in the matter of its entrance into the markets of the Eastern states. At an adjourned meeting on March 17, 1875, the committee reported that an agreement had been made with the California Powder Works regulating the trade of both of the parties, that it was thought best to preserve the agreement amongst the confidential records of the association, and that, in accordance with the terms of the agreement, the association should adopt a series of rules regulating sales and prices of powder in what was called the "neutral ground," being Utah, Montana, Wyoming, Colorado, and New Mexico. By these rules, which the association immediately adopted, certain agents of the companies constituting the Gunpowder Trade Association fixed the prices of powder delivered in the states and territories composing the "neutral ground," the California Powder Works became bound thereby, and a fine was prescribed for every violation of the rules. On May 3, 1876, the committee of the Gunpowder Trade Association previously appointed to confer with the Sycamore Manufacturing Company reported that that company had promised to observe the rates fixed by the association. On August 2, 1876, the association amended the agreement of April 29, 1872, by authorizing fines to be imposed upon its members for violations of the agreement and prescribing a method of procedure for the trial of alleged offenders before the association and the collection of the fines. On February 11, 1880, the California Powder Works and the seven companies composing the Gunpowder Trade Association entered into a new agreement, in lieu of the one dated February 11, 1875, restricting the right of the members of the association to carry on their trade in certain of the Pacific states and territories, and the right of the California Powder Works to trade in any part of the United States east of the "neutral ground," regulating sales within the neutral territory, and fixing the fines to be paid by those who should violate the terms of the agreement. As illustrations

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of the power exercised by the association under the agreement of April 29, 1872, out of many that might [186] be mentioned, we refer to some excerpts from the proofs reproduced in the margin.*

*At a special meeting of the Gunpowder Trade Association on October 18, 1876, the following resolutions were adopted:

"Whereas, the reduced prices for blasting powder recently made by certain parties in the coal fields of Ohio, Illinois, and Iowa not only tend to demoralize the general trade but to impair the proper interests of this Association: It is therefore deemed advisable to adopt the following:

"Resolved—That the price of blasting powder in the Youngstown district, which includes the counties of Trumbull and Mahoning, Ohio, and Mercer and Lawrence, Penn., also the Akron and Massillon districts, comprising the coal fields of Summit, Medina, Wayne, Stark, Tuscarawas counties, Ohio, be fixed at \$2.50 per keg—car load lots at \$2.40 per keg.

"Resolved—That the price of blasting powder in the coal districts of Illinois and Iowa be \$2.60 per keg, car load lots \$2.50 per keg.

"Resolved—That the foregoing resolutions apply to the consumption in the coal fields only in the states mentioned, that they are passed in self-defense for mutual protection, and to the intent that each associate may be enabled to hold his own trade.

"Resolved—That the Hazard Powder Company be permitted to sell blasting powder as low as \$2.00 per keg in the Middlefield district.

"Resolved—That the committee on prices be authorized in their judgment to revise and regulate prices at all points where cuts are made or attempted by any outside parties—notice of such change in prices to be wired to each associate not less than twenty-four hours before the same goes into effect."

At the stated meeting of the association on February 5, 1879, the following was adopted:

"On motion of Col. du Pont, that prices at Memphis, Nashville, and such other points as are affected by the prices of King's powder, be modified as the price committee shall decide."

The compendium of rules of June 1, 1881, contained the following:

"Associates not already in the enjoyment of trade in the Lake Superior district shall refrain from selling powder therein, or to go to that district. Lake Superior Powder Co. to confine its sales of powder to consumers within its proper district."

On August 3, 1881, the association adopted the following:

"On motion, that each associate shall instruct in writing his representative agent at Denver not to sell any powder to agents of the Giant Powder Co. at any price."

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Previous to August 23, 1886, the Gunpowder Trade Association composed of the seven members above mentioned, heard and disposed of several hundred complaints of violations of the agreements above referred to and imposed many fines. Other companies, not parties to those agreements, had for some years been waging a warfare with the members of the Gunpowder Trade Association. Among these were the Sycamore Manufacturing Company of Tennessee, the Lake Superior Powder Company of Michigan, the King's Great Western Powder Company (whose name was subsequently changed to the King Powder Company) of Ohio, the Ohio Powder Company of Ohio, and the Marcellus Powder Company of New York. On the date last mentioned (August 23, 1886) these five companies united with the seven companies who had formerly constituted the Gunpowder Trade Association in a new trade agreement the purpose of which, as expressed in its language, was to regulate the business of the parties thereto, including the prices at which powder should be sold, to the end that the parties might avoid unnecessary loss by "ill-regulated or unauthor-ized" competition. The agreement excepted from its operation trade with foreign countries, with the government of the United States, and with parties within the anthracite regions of the state of Pennsylvania, apportioned amongst its twelve parties the maximum yearly trade allowed to them respectively, provided for a supplementary agreement with the California Powder Works concerning sales in the Pacific States and the "neutral territory," provided for sworn statements of sales to be delivered annually by each of the twelve parties to designated representatives, created a board of arbitration to settle disputes between the parties, provided for the execution of supplementary agreements relating to prices to be maintained for the sales of powder and the general harmonious arrangement of the powder trade, and also provided, finally, that since the Laflin & Rand Powder Company, one of the twelve parties to the agreement, owned a majority of the capital stock of the Schaghticoke Powder Company the former company would guarantee that the latter company would respect and comply with the provisions

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of the agreement as though it were a party thereto, and that all sales by the Schaghticoke Powder Company should be considered as sales of the Laffin & Rand Powder Company. Supplementary agreements were subsequently entered into with the California Powder Works and by the agents of the parties to the agreement of August 23, 1886, for the regulation of the powder trade in particular localities. New Orleans, Louisville, Cincinnati, and Chattanooga, especially, were affected by such supplementary agreements. It is not improbable that there were other supplementary agreements affecting other places, for it appears that the agreements were furnished in printed blank forms. Their purpose was to regulate the trade by establishing and maintaining uniform prices and giving effect to the principal agreement of August 23, 1886.

The agreement of August 23, 1886, expired by its own terms on December 31, 1889. In anticipation of its expiration the same twelve parties who had executed it, on December 19, 1889, executed a new agreement, called the "Fundamental Agreement," for a term beginning January 1, 1890, and ending June 30, 1895, with an added provision that it should continue thereafter from year to year unless terminated in the manner therein provided for. As this Fundamental Agreement continued to be observed with more or less fidelity by the parties to it, not only before but for several years after the enactment of the Anti-Trust Act, its provisions are of especial interest. Its principal parties were the copartnership, E. I. du Pont de Nemours & Co., and the corporations, Hazard Powder Company and Laffin & Rand Powder Company. These three parties were, in some of the provisions of the agreement, grouped as one collective party and called the "Three Companies." The agreement recited that the twelve parties made and sold gunpowder for blasting or sporting purposes, or both, and declared its purpose to be to regulate in a convenient and desirable manner the business of the parties thereto, to avoid unnecessary loss in the [138] sale and disposition of their powder by "ill-regulated or unauthorized competition and underbidding of the agents of the parties" thereto, and to protect consumers and the public from unjust fluctuations in prices and from un-

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just discriminations. It excepted from its operation trade with foreign countries, trade with the government of the United States, and trade in blasting powder in the anthracite regions of Pennsylvania. The portion of the United States subject to the operation of the agreement was divided into seven districts, within each of which, it was declared, uniform prices should generally prevail. Yearly allotments of trade were made to the "Three Companies" as one collective party, and to each of the other nine parties. The trade in the "neutral belt" and in certain of the Pacific States was to be regulated by a supplementary agreement with the California Powder Works. Periods for settlements in the division of trade were fixed, and sworn statements of sales were required to be furnished by each of the parties (the "Three Companies" being considered as one party) to the board of trade, a body established by the agreement, whose duty it was, *inter alia*, to adjust the differences in sales according to the money values permitted to each party in the division of trade, and to require payment into the treasury of the association by the debtor parties and make distribution thereof amongst all parties according to their rights under the agreement. The board of trade consisted of five members, who were elected by the parties to the agreement at their annual meetings. The board was required to meet quarterly, and was authorized to fix prices, to vary or change the same at any time and for any place, to meet contingencies for the protection of the common interests of the parties to the agreement, to enforce rules and regulations adopted by the parties by any measure it might deem necessary, and to hear and adjudge cases of grievances. General meetings of the parties to the agreement were provided for, and the association at any of its general meetings was authorized to review or reverse the acts of the board of trade and to instruct it upon any matter. It was also provided that any party to the agreement who should suffer excessive loss by an overt act of the board of trade—as by the reduction of a price at a place in treatment of a "local disturbance of trade"—should receive such compensation for the damage sustained by it as might be recommended by the

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board of trade and agreed to at a general meeting. Supplementary agreements by the parties were authorized relating to the fixing of prices and the control of the trade. It was further agreed that sales by the Schaghticoke Powder Company should be considered as sales of the Laffin & Rand Powder Company and the latter company guaranteed compliance with the provisions of the agreement by the Schaghticoke Company.

In 1895 the copartnership, E. I. du Pont de Nemours & Co., and the Laffin & Rand Powder Company, who then owned a majority of the capital stocks of the Reapauno Chemical Company and the Hercules Powder Company, decided to consolidate those two com[189]panies and the Atlantic Dynamite Company in one corporation, called the Eastern Dynamite Company, which they caused to be organized under the laws of New Jersey with an authorized capital stock of \$2,000,000 (200,000 shares), all of which was issued to the stockholders of the three companies thus brought into subsidiary relations to the Eastern Dynamite Company. By this amalgamation of interests centralization of control of the dynamite business previously carried on by the three companies was secured. Later the Eastern Dynamite Company purchased the stocks of a large number of other powder, dynamite, and chemical companies, and thereby obtained control of them.

Previous to July 1, 1896, the Chattanooga Powder Company, with mills in Tennessee, the Equitable Powder Manufacturing Company, of New Jersey, with a plant in Illinois, the Southern Powder Company, having mills in Georgia, and the Phoenix Powder Manufacturing Company, of West Virginia, with mills in New Jersey, West Virginia, and Illinois, developed competing businesses with one another and with the parties to the Fundamental Agreement of December 19, 1889. Against them, the Hazard, the du Pont, and the Sycamore companies carried on a sharp contest. Negotiations with their representatives, in May, 1896, resulted in allotments of the trade to them, and on August 20, 1896, these four companies, with the California Powder Works and the twelve parties to the Fundamental Agreement of

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December 19, 1889, being seventeen parties in all, entered into another Fundamental Agreement concerning the manufacture and sale of powder for blasting and sporting purposes, which was dated July 1, 1896, and was in its general terms not unlike the agreement of December 19, 1889. Some time between August 20 and September 24, 1896, however, the board of trade was supplanted by what was thereafter known as the "advisory committee."

On October 26, 1897, an agreement was entered into by ten American manufacturers, eight of whom were parties to the agreement of July 1, 1896, and two European manufacturers, which related to explosives of all kinds, provided that the European parties should not complete works then building in New Jersey, and that the American parties should bear all expenses theretofore incurred in connection therewith, contained mutually restraining provisions as to the erection of factories in the United States and Europe, divided the trade of the world territorially between the American and the European parties, contained provisions for fixing prices, provided a fund for the purpose of protecting the common interest against outside competition, fixed fines and penalties for breaches of the agreement, and contained sundry other provisions for the regulation and control of the trade. This agreement was in existence throughout the period of the war with Spain and until 1906.

On October 21, 1899, the E. I. du Pont de Nemours & Co. was incorporated under the laws of Delaware with an authorized capital stock of \$2,000,000. The incorporators of this company were the members of the previous copartnership of the same name—Eugene [140] du Pont, Francis G. du Pont, Henry A. du Pont, Alexis I. du Pont, Charles I. du Pont, and Alfred I. du Pont. The business and property of the copartnership were sold to the corporation, and each partner received a proportion of the capital stock equal to his interest in the copartnership. Eugene du Pont had been the manager of the partnership business for 10 years. He naturally became the president of the corporation. He was also a member of the advisory committee of the associated manufacturers for years prior to January, 1902, in which

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month he died. Upon Eugene's death the remaining stockholders, excepting Alfred, were strongly disposed to sell out to the Lafin & Rand Powder Company. Alfred solicited the interest of Thomas Coleman du Pont and Pierre S. du Pont, neither of whom had theretofore been interested in the business, and these three persons—Alfred, Thomas, and Pierre du Pont—made to the stockholders an offer to purchase, which was accepted. Thus was it that in February, 1902, the du Pont powder industry passed into the control of those who at present dominate it. For 30 years trade agreements had been in existence, in every one of which the du Ponts were active parties. There were times when the parties to these agreements broke away from and disregarded them, but usually the fines and penalties imposed on the violators preserved the integrity of the organization. The association of manufacturers of powder and other explosives had probably never been stronger than it was in February, 1902, when the change in the management of the du Pont works took place. It had for years arbitrarily fixed prices in the different parts of the United States, waging a disastrous warfare against competitors until they were coerced into terms satisfactory to the association or brought into the association. In express language, the trade agreements disclosed the purpose of fixing prices, and at the meetings of the association, and of its council, board of arbitration, board of trade, and advisory committee, measures were often devised to limit the output of the members of the association and to crush competition by manufacturers not members of the association. When Thomas Coleman du Pont, Pierre S. du Pont, and Alfred I. du Pont purchased the du Pont business, they came into possession of a business that had been developed under trade agreements which the learned counsel for the defendants admit contravene at least the first section of the anti-trust act. One of these agreements—the one dated July 1, 1896—was still in force, and it is important to know how the associated parties conducted their business affairs after the death of Eugene du Pont in January, 1902.

On February 26, 1902, Thomas Coleman, Pierre S., and Alfred I. du Pont caused to be organized, under the laws of

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Delaware, a new corporation, called E. I. du Pont de Nemours Company with an authorized capital stock of \$20,000,000. This new company (hereafter called the du Pont Company of 1902) then issued its promissory notes for the sum of \$12,000,000 and 119,970 shares of its capital stock, whose par value was \$11,997,000, to E. I. du Pont de Nemours & Co. of 1899 for the property, assets, and good will of the latter company, excepting certain parcels of its real estate, and the stockholders [141] of the latter company amongst whom the notes and stock of the new company had been distributed in proportion to their holdings of stock in the company of 1899, caused 89,400 shares of the stock of the new company to be transferred to Thomas Coleman, Pierre S., and Alfred I. du Pont. The stock so transferred to these three gentlemen gave them the control of the du Pont Company of 1902, and that control they have ever since had. About 40 per cent of the property acquired from the corporation of 1899 by the du Pont Company of 1902 consisted of five plants used in manufacturing and selling the du Pont explosives, namely, one at Wilmington, Del., one at Sycamore, Tenn., one at Moor, Iowa, one at Carney's Point, N. J., and one in the anthracite region of Pennsylvania. About 60 per cent consisted of stocks in other corporations which manufactured and sold explosives of various kinds. It owned all of the stock of the Hazard Powder Company, consisting of 10,000 shares, which company had but one operating plant; the greater part of its assets consisting of stocks in other companies. The du Pont Company of 1902 was therefore at first both a holding and an operating company. Its interest as a holding company exceeded its interest as an operating company. Indeed, its interest as an operating company continued but little over a year, for by October 1, 1903, it had conveyed all its tangible assets to other corporations for the stocks of those corporations. On April 2, 1902, Thomas Coleman du Pont, president of the du Pont Company of 1902, was elected a member of the advisory committee of the association organized under the trade agreement of July 1, 1896. On October 2, 1902, at the annual general meeting of the manufacturers' association, Mr.

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T. C. du Pont being in the chair, a revised compendium of rules was recommended to the advisory committee for adoption and on November 7 that committee adopted the compendium. It authorized the advisory committee to appoint a special committee which should have authority, between the meetings of the advisory committee, to increase rebates on existing contracts for blasting powder and to recommend sales below the schedule prices to buyers under contract, and contained other drastic provisions for eliminating competition and controlling the trade. Mr. T. C. du Pont was a member of this special committee. At this time the du Pont Company of 1902 owned stocks in the Austin Powder Company, Birmingham Powder Company, California Powder Works, Chattanooga Powder Company, Consumers Powder Company, Eastern Dynamite Company, Enterprise Powder Company, Equitable Powder Manufacturing Company, Fairmount Powder Company, Indiana Powder Company, Laffin Powder Manufacturing Company, Lake Superior Powder Company, Mahoning Powder Company, Northwestern Powder Company, Ohio Powder Company, Oriental Powder Mills, and Phoenix Powder Manufacturing Company. It owned, as above stated, all the capital stock of the Hazard Powder Company, and that company owned stocks in the Eastern Dynamite Company, Hecla Powder Company, Lake Superior Powder Company, Ohio Powder Company, Oriental Powder Mills, and Phoenix Powder Manufacturing Company. Of these companies the du Pont Company of 1902 controlled only the Fairmount [142] and the Oriental. Pierre S. du Pont says that he and his associates felt, at the time they took over the property of the du Pont Company of 1899, that they commanded but little of the business of these other corporations. In the course of their investigations they discovered that the Laffin & Rand Powder Company was largely interested by reason of its stockholdings in many of these other corporations, and that the du Pont Company of 1902 and the Laffin & Rand Company, together, could control them. He declares that their plants were pretty thoroughly scattered about the country and were well located, that freights on explosives are very high, so that it is im-

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possible to ship them to any great distance without undue expense, and that the plants were desirable ones to control. The plan was then conceived of purchasing the capital stock of the Laffin & Rand Powder Company, consisting of 10,000 shares, which company, it will be remembered, had been a party to each of the trade agreements of April 29, 1872, August 23, 1886, December 19, 1889, and July 1, 1896, and had participated in the enforcement of the methods of the association of manufacturers for the elimination of competition and the control of the trade. If the du Pont Company of 1902 and the Hazard and the Laffin & Rand companies could be united in corporate form it was as apparent then as it is now that the advantages that had been obtained under the trade agreements could be more firmly and more certainly retained. Accordingly, the following plan for securing control of the Laffin & Rand Company was devised:

On September 20, 1902, under the laws of Delaware, there were organized the Delaware Securities Company, with an authorized capital stock of \$8,000,000, and the Delaware Investment Company, with an authorized capital stock of \$2,500,000. Of certain persons, who held 5,524 shares, or a majority, of the stock of the Laffin & Rand Company, a part also held 950 shares of the stock of the Moosic Powder Company. That part refused to sell their holdings in the Laffin & Rand Company unless the purchaser would also take the 950 shares of the Moosic stock. Accordingly, T. C. du Pont obtained an option on the majority of the stock of the Laffin & Rand Company and on the 950 shares of the Moosic stock. In payment for the 5,524 shares of the Laffin & Rand stock and for his services T. C. du Pont, who, under his option, had acquired the 5,524 shares of the Laffin & Rand stock, received from the Delaware Securities Company \$3,998,000 (par value) of its stock and \$2,209,600 of its bonds; that is to say, over \$1,100 in such stock and bonds for each share of the stock of the Laffin & Rand Company. Much the larger part of the stock of the Delaware Securities Company, and therefore the control of that company, was transferred to the du Pont Company of 1902. In payment for the 950 shares of the Moosic stock and for his services

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T. C. du Pont, who, under his option, had acquired that stock also, received from the Delaware Investment Company \$2,498,000 (par value) of its stock and \$2,500,000 of its bonds, of which stock much the larger part, and therefore the control, was transferred to the du Pont Company of 1902. The bonds of the Delaware Securities Company and the Delaware Investment Company were secured by the Laffin & Rand stock and the Moosic stock so purchased, and by stock of the East[143]ern Dynamite Company, the Hazard Powder Company, and the du Pont Company of 1902, loaned for that purpose by T. C. du Pont. By this arrangement it will be observed the Laffin & Rand Company was controlled by the Delaware Securities Company, and the Delaware Securities Company by the du Pont Company of 1902. At the time of this purchase the Laffin & Rand Company owned 1,410 of the 3,000 shares of the Moosic; consequently, the acquisition of the additional 950 shares of the Moosic, whose par value was \$95,000, and for which was paid stock and bonds of the par value of \$4,998,000, gave to the du Pont Company of 1902 control, also, of the Moosic Powder Company. This was a seemingly excessive price to pay for such control, and is strong evidence of a purpose to destroy competition and promote monopoly; for in less than a year afterward the whole of the capital stock of the Moosic Powder Company (\$300,000) was transferred to E. I. du Pont de Nemours & Co. of Pennsylvania for \$889,458.95 of the stock of the holding company.

Some time previous to 1902 the Fairmont Powder Company had been organized under the laws of West Virginia. The combination then existing under the trade agreement of July 1, 1896, instituted a contest against the Fairmont. Prices were reduced and in the year 1902 the du Pont Company of 1902 obtained the Fairmont's stock. These transactions were completed in October, 1902; that is, in the same month in which the revised compendium of rules for the government of the associated companies, above referred to, went into effect. Mr. T. C. du Pont, one of the purchasers of the du Pont business in February, 1902, without previous experience in the powder or explosive business, but with an

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ability that commands high admiration, succeeded, within the period of six months after his election as a member of the advisory committee of the associated companies, in cementing the principal parties to the trade association in a union much more able to cope with competitors and to secure control of the trade in powder and other explosives than any of the associations that had preceded it. The effects of the consolidation were soon evident. In December, 1902, Mr. Arthur J. Moxham, then president of the Hazard Powder Company, delivered an address at a general meeting of the associated companies in which, after reviewing the history of the explosives trade for some years and concluding that the advance in prices from 1896 to 1902 had been too small, he said:

"It does not suffice to say that at to-day's prices there is a fair margin of profit, because the fact is that at to-day's prices there ought to be something more than a fair margin. There should be a heavy margin of profit, and in the fact that there is not we see a menace to the future of the business. The present phenomenal prosperity cannot last. If past history is to guide us, we must assume that it will be followed by a period of reaction. During this period of reaction the price of powder must come down heavily. When the demand comes from our customers to reduce the price when everything else is being reduced, it will be no answer to say that we did not advance it when we could. During periods of depression the purchaser, not the seller, is in control of the market, and the irresistible logic of all past history shows that his control is absolute. In a country of such trade irregularities as that of the United States, it is only by a high profit during periods of prosperity that a fair return to capital can be maintained in face of the minimum that follows the period of trade distress."

[144] His recommendation, therefore, was that prices should be advanced, and they were advanced immediately in nearly the whole of the United States, thus showing the confidence of the associated companies in their ability to control the explosives business in this country.

In 1908 the Consumers' Powder Company, the Enterprise Powder Manufacturing Company, the Moosic Powder Company, and the Oliver Powder Company, all corporations of Pennsylvania, were merged into E. I. du Pont de Nemours & Co. of Pennsylvania, the capital stock of the last-men-

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tioned, company having been increased for that purpose from \$20,000 to \$2,000,000 and a majority of it being now owned by the next-mentioned company. On May 19, 1903, the E. I. du Pont de Nemours Powder Company (hereafter called the du Pont Company of 1903) was organized under the laws of New Jersey, with an authorized capital of \$50,000,000 of preferred and common stock. Thereupon the du Pont Company of 1902 assigned all its stockholdings in other companies (about 35 of them) to the du Pont Company of 1903, and took in exchange therefor \$30,200,000 (a majority) of the preferred and common stock of the du Pont Company of 1903. In 1903, also, the California Investment Company was organized under the laws of Delaware with an authorized capital stock of \$400,000, the majority of which stock is now owned by the du Pont Company of 1903, and through it the du Pont Company of 1903 obtained control of the Judson Dynamite & Powder Company, a corporation of California, with its authorized capital stock of \$2,000,000. In December, 1903, the du Pont International Powder Company was organized, under the laws of Delaware, with an authorized capital stock, preferred and common, of \$10,000,000, the majority of which is owned by the du Pont Company of 1903. Through the du Pont International Company the du Pont Company of 1903 acquired control of the International Smokeless Powder & Chemical Company with its issued preferred and common stock of \$9,600,000, which acquisition gave it control of all the trade in military smokeless and ordnance smokeless powders except the part of the trade due to certain powders manufactured by the United States government.

The advisory and special committees of the trade association held numerous meetings between September 24, 1896, and June 30, 1904. Eugene du Pont had been one of the members of the advisory committee and had participated in its clearly revealed policy of acquiring control of the explosives trade under the trade association agreement of July 1, 1896—an agreement which, as previously stated, counsel for the defendants have frankly conceded violated the Anti-Trust act. There was no diminution of effort to perfect such control after Eugene du Pont's death. On the contrary, after

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Thomas Coleman, Pierre S., and Alfred I. du Pont had come into the management of the du Pont business, and Thomas Coleman du Pont had been elected as the successor of Eugene in the advisory committee, and become a member of the special committee, the advisory and special committees, as above stated, continued their meetings and fixed special prices and special rebates in multitudes of cases and apportioned the trade in explosives amongst the members of the trade association. In a letter [145] from the secretary of the special committee to the secretary of the advisory committee, dated as late as June 16, 1904, it appears that the former committee recommended special prices for certain contracts entered into by one of the du Pont companies, and by the Hazard, Lafin & Rand, Oriental, Ohio, Birmingham, Miami, Chattanooga, Phoenix, and Indiana Powder companies, with varying allowances for rebates from the prices so fixed. This policy of fixing prices in particular cases, affecting particular localities, was one which the independent manufacturers of explosives could not easily cope with. The evidence shows that in October, 1905, a committee of independent powder and dynamite manufacturers met Mr. Jonathan A. Haskell, president of the Lafin & Rand Powder Company and vice president of the du Pont Company of 1903, and Mr. Charles Patterson, director of sales for the du Pont Company of 1903, for a conference concerning the low prices at that time prevailing. Mr. Koller, one of the members of the committee of the independents, says that at the conference Mr. Haskell declared that in the past the policy of the interests represented by him had been to buy up plants, but that in the future the "survival of the fittest" would determine who should have the trade. Mr. Haskell admits that he informed this committee that the interests represented by him had discontinued the practice of making agreements to fix prices, and he adds in his testimony that the change in policy was made in 1904.

After the incorporation of the du Pont Company of 1903, a sales board was created. This board, composed of a director of sales and assistant directors, coexisted with the advisory and special committees until June 30, 1904, when the committees were superseded by the sales board, which there-

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after exercised the power of fixing prices and policies for the corporations that had, by the methods already outlined, been brought together under one corporate management. In July, 1904, there was no further need of advisory or special committees, or of the trade association formed under the agreement of July 1, 1896. All the advantages of the trade association agreement were now much better secured by the series of corporate transmutations that had followed the introduction of T. C. du Pont and Pierre S. du Pont into the explosives business. Between 1902 and the commencement of this suit in July, 1907, many of the corporations whose property and business had been acquired by the above-mentioned methods were dissolved, and thereby the relations of the combined companies were simplified and the assurances of the perpetuity of their power were increased. We have verified the tabulated statement contained in the brief for the government, and we find that in 1907 the du Pont Company of 1902, through its subsidiary corporation, controlled in the United States of the trade in—

	Per cent.
Black blasting powder	64
Saltpeter blasting powder.....	72
Dynamite	72
Black sporting powder.....	73
Smokeless sporting powder.....	64
Smokeless military and ordnance powder, exclusive of what the U. S. government itself made.....	100

[146] Certain exhibits furnished by the defendants show that previous to September 22, 1907, the du Pont Company of 1903 and the Eastern Dynamite Company had acquired control of 64 different corporations which between April 30, 1904, and September 22, 1907, they caused to be dissolved. The names of these corporations, with the dates when they were respectively dissolved, are stated in the margin.* The

* The following is a list of corporations, controlled by the du Pont Company of 1903 and the Eastern Dynamite Company, with the dates when they were dissolved. The list is extracted from Government Exhibits 891 and 892, which the defendants prepared:

Blue Ridge Powder Co.....	Dissolved April 30, 1904.
U. S. Dynamite Co.	" " " "
Laffin Powder Mfg. Co.	" May 2, "

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petition of the government charges that the policy of acquiring the assets of other corporations and then dissolving

Hudson River Powder Co.....	Dissolved June 3, 1904.
Acme Powder Co.....	" " 30, "
Columbia Powder Co.....	" " " "
Dittmar Powder & Chemical Co.....	" " " "
Mt. Wolf Dynamite Co.....	" " " "
Rock Glycerine Co.....	" " " "
Sterling Dynamite Co.....	" " " "
Atlantic Dynamite Co. of N. J.....	" " " "
Atlantic Dynamite Co. of N. Y.....	" " " "
Hecla Dynamite Co.....	" " " "
Hercules Powder Co.....	" " " "
Repauno Chemical Co.....	" " " "
Repauno Mfg. Co.....	" " " "
Clinton Dynamite Co.....	" July 1, "
A. Kirk & Son Co.....	" " " "
Robins Fuse Co.....	" " " "
Weldy Dynamite Co.....	" " " "
Oliver Dynamite Co.....	" " " "
Monarch Powder Co.....	" Aug. 1, "
Forcite Powder Co. N. J.....	" Jan. 1, 1905.
Forcite Powder Co. of N. Y.....	" " " "
New York Powder Co. of N. J.....	" " " "
New York Powder Co. of N. Y.....	" " " "
Electric Powder Co.....	" " 31, "
Joplin Power Co.....	" March 1, "
Shenandoah Powder Co.....	" " " "
Brooklyn Glyc. Mfg. & Ref. Co.....	" April 30, "
Pennsylvania Torpedo Co.....	" " " "
A. S. Speece Powder Mfg. Co.....	" " " "
Giant Mfg. Co.....	" June 30, "
Standard Exp. Co., Limited.....	" " " "
Metropolitan Powder Co.....	" Sept. 21, "
Climax Powder Mfg. Co.....	" " 22, "
Explosives Supply Co.....	" " " "
American Stor. & Deliv. Co.....	" " " "
Atlantic Mfg. Co.....	" " " "
Hudson River Wood Pulp Mfg. Co.....	" " " "
National Torpedo Co.....	" " " "
Producers Powder Co.....	" " " "
Chattanooga Powder Co.....	" " " "
Lake Superior Powder Co.....	" " " "
Ohio Powder Co.....	" " " "
American Forcite Powder Mfg. Co.....	" " 30, "
Hecla Powder Co.....	" " " "

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there was for the purpose of establishing a monopoly in one corporation. The du Pont Company of 1902, the du Pont Company of 1903, Thomas Coleman du Pont and Pierre S. du Pont admit, by their joint and several answer, that their policy was eventually to vest absolute ownership of all the plants, manufactories and tangible property acquired by the methods above mentioned in one corporation, and then to dissolve the subsidiary corporations. They say, further, that as soon as they can legally do so it is their purpose to dissolve the Lafin & Rand Powder Company, the Hazard Powder Company, the Eastern Dynamite Company, the Delaware Securities Company, and the Delaware Investment Company. It is perfectly clear that in 1902 the plan was originated of bringing under one corporate control as many as possible of the corporations engaged in the explosives business. The achievement of the object was the easier because of the [147] conditions created by the existence from July 1, 1896 of the trade association formed under the agreement of that date. Before 1902 the plan was to destroy competition and obtain a monopoly by the enforcement of drastic provisions in trade agreements, and from 1902 to 1907 it was to achieve the same ends by substituting corporate forms and powers for trade agreements. The success of the plan is evident. Pierre S. du Pont, in his

Anthracite Powder Co.....	Dissolved Sept. 30, 1905.
Globe Powder Co.....	" " " "
Marcellus Powder Co.....	" " " "
H. Julius Smith Elec. Fuse Co.....	" Dec. 31, "
James Macbeth & Co.....	" " " "
Phoenix Powder Mfg. Co.....	" " " "
Conemaugh Powder Co.....	" April 30, 1906.
Enterprise High Explosive Co.....	" July 1, "
Schaghticoke Powder Co.....	" Nov. 1, "
California Vig. Powder Co.....	" " 28, "
California Powder Works.....	" Jan. 1, 1907.
Western Torpedo Co.....	" " " "
Oliver Powder Co.....	" March 25, "
Thompson Torpedo Co.....	" April 27, "
E. I. du Pont Co.....	" July 1, "
King Mercantile Co.....	" " " "
Mahoning Powder Co.....	" Sept. 25, "

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testimony given October 21, 1909, said that the du Pont Company of 1903 had then paid dividends amounting to \$11,000,000 and had a surplus in its treasury of \$12,000,000 or \$13,000,000. It is true that many of the corporations brought into the combination were not large. A considerable number of them, possibly, did little, if any, interstate trade. It is not denied, however, that many of them carried on an extensive commerce among the States. Indeed, it conclusively appears that it is a common practice for manufacturers of explosives to ship their products, dangerous and expensive as the business is, from State to State, and for a manufacturer in one part of the country to ship his products to, and sell them in, other parts in competition with manufacturers there. Shipments by the Hazard Powder Company from Connecticut to Georgia and Alabama to compete there with the Chattanooga and other powder companies are examples of interstate trade disclosed by the evidence.

[148] Summarizing the facts as to the relations of the 28 defendants, which are the subject of our present inquiry, we find that:

The Hazard Powder Company has issued 10,000 shares, all of which are owned by the du Pont Company of 1903.

The Laffin & Rand Powder Company has issued 10,000 shares, of which at least 5,524 shares are owned by the Delaware Securities Company, and almost the whole of the stock of the latter company is owned by the du Pont Company of 1903.

The Eastern Dynamite Company has issued 20,000 shares, of which the majority is owned by the Hazard, the Laffin & Rand, and the du Pont Company of 1903.

The Fairmont Powder Company has issued 750 shares, of which the majority is owned by the du Pont Company of 1903.

The International Smokeless Powder & Chemical Company has issued preferred and common stock to the amount \$9,600,000, the majority of which, through the du Pont International Powder Company, is controlled by the du Pont Company of 1903.

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The Judson Dynamite & Powder Company has issued 20,000 shares which are owned by the California Investment Company. The stock of this latter company is owned by the du Pont Company of 1903.

The Delaware Securities Company, created for the acquisition of stock of the Laflin & Rand Powder Company, has an authorized capital stock of 80,000 shares, of which a majority is owned by the du Pont Company of 1903.

The Delaware Investment Company, created for the acquisition of 950 shares of the Moosic Powder Company, has an authorized capital stock of 25,000 shares, of which the majority is owned by the du Pont Company of 1903.

The California Investment Company, created for the acquisition of the stock of the Judson Dynamite & Powder Company, has an authorized capital stock of 4,000 shares, a majority of which is owned by the du Pont Company of 1903.

E. I. du Pont de Nemours & Co. of Pennsylvania has an authorized capital stock of 20,000 shares, the majority of which was issued for stocks in subsidiary corporations in Pennsylvania, and passed ultimately into the control of the du Pont Company of 1902 and then into the control of the du Pont Company of 1903.

The du Pont International Powder Company has an authorized capital stock of \$10,000,000, preferred and common, a majority of which is owned by the du Pont Company of 1903.

The du Pont Company of 1903 is the owner of the capital stocks, or a majority of the capital stocks, of the corporations above mentioned.

The du Pont Company of 1902 is the owner of the capital stock of the du Pont Company of 1903, and therefore controls all twelve of the above-mentioned corporations as its subsidiaries.

The defendants Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry F. du Pont, Irene du Pont, Francis I. du Pont, Victor du Pont, Jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M. [149] Barksdale, and Frank L. Connable are each directors of the du Pont com-

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panies of 1902 and 1903, or of one of them. Thomas Coleman du Pont is also president of both of them. Edmond G. Buckner is an active director of the International Smokeless Powder & Chemical Company.

It is clear that these 28 defendants are associated in a combination for carrying on interstate commerce in powder and other explosives.

3. We come, therefore, to the consideration of the second question, which is:

Second. *Is the combination which we have found to exist one that is obnoxious to the provisions of the Anti-Trust Act?*

The act declares that every combination, in the form of a trust or otherwise, in restraint of trade or commerce among the several states, is illegal, and that it is a crime for any person to monopolize, or attempt to monopolize, or combine with others to monopolize, any part of such trade or commerce. From early times it has been a rule of the courts not to construe a legislative act in a literal manner, where it is clear that by such construction the legislative purpose will be defeated. A statute which treats of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," if literally construed would apply to bishops; but by the application of the "rule of reason" bishops are excluded from the terms of such an act because, being of a higher order than any of the functionaries specifically mentioned, it is concluded that the legislative purpose does not extend to bishops. "If an act of Parliament gives a man power to try all causes that arise in his manor of Dale, yet if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel," 1 Black. Com. 91. In *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, the Supreme Court had before it the construction of the act which declares it to be—

"unlawful for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or mi-

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gration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia."

The question was whether the act was applicable to a contract between Holy Trinity Church and an alien, by which the alien agreed to remove from England to New York and enter into the service of the church as its rector and pastor. Mr. Justice Brewer, speaking for the court, said:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, [150] strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

A number of bills were introduced in the Fiftieth Congress (in August and September, 1888), designed to make unlawful every combination "to prevent competition" and "to prevent full and free competition" in the sales of articles transported from one state to another. None of them was enacted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-First Congress a bill which declared unlawful every combination "to prevent full and free competition" in such sales. After much debate the bill was, on March 27, 1890, referred to the committee on judiciary, and on April 2, 1890, that committee reported it

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back to the Senate with an amendment, drawn by the late Senator Hoar, striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination "to prevent competition." What it condemns is every combination in restraint of trade or commerce among the several states, etc. When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of "preventing competition" either in the purchase or sale of commodities; but the amendment was disagreed to. While there is a "general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body" (*United States v. Freight Association*, 166 U. S. 318, 17 Sup. Ct. 540, 41 L. Ed. 1007), that rule "in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted" (*Standard Oil Co. v. United States*, 221 U. S. 50, 31 Sup. Ct. 512, 55 L. Ed. 619, decided May 15, 1911).

There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-Trust Act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a co-partnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate [151] trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever

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their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain "trade or commerce among the several states." To what extent the Anti-Trust Act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

The recent decisions of the Supreme Court in *Standard Oil Co. v. United States*, and *American Tobacco Co. v. United States*, 221 U. S. 106, 81 Sup. Ct. 632, 55 L. Ed. 663, make it quite clear that the language of the Anti-Trust Act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the Anti-Trust Act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common-law restraint of trade. This fact was plainly recognized in *United States v. Joint Traffic Association*, 171 U. S. 505, 567, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, where Mr. Justice Peckham said:

"We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term."

While all this is true, the recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the Anti-Trust Act merely by the form

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it assumes or by the dress it wears. It matters not whether the combination be "in the form of a trust or otherwise," whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes, or attempts to monopolize a part of that commerce, in a sense that violates the Anti-Trust Act.

4. The record of the case now before us shows that from 1872 to 1902, a period of 30 years, the purpose of the trade associations had been to dominate the powder and explosives trade in the United States, by fixing prices, not according to any law of supply and demand, for they arbitrarily limited the output of each member, but according to [152] the will of their managers. It appears, further, that although these associations were not always strong enough to control absolutely the prices of explosives, their purpose to do so was never abandoned. Under the last of the trade association agreements—the one dated July 1, 1896, and which was in force until June 30, 1904—the control of the combination was firmer than it had before been. Succeeding the death of Eugene du Pont in January, 1902, and the advent of Thomas Coleman du Pont and Pierre S. Du Pont, the attempt was made to continue the restraint upon interstate commerce and the monopoly then existing by vesting, in a few corporations, the title to the assets of all the corporations affiliated with the trade association, then dissolving the corporations whose assets had been so acquired, and binding the few corporations owning the operating plants in one holding company, which should be able to prescribe policies and control the business of all the subsidiaries without the uncertainties attendant upon a combination in the nature of a trade association. That attempt resulted in complete success.

Much the larger part of the trade in black and smokeless powder and dynamite in the United States is now under the control of the combination supported by the 28 defendants above named. That combination is the successor of the com-

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bination in existence from 1896 to June 30, 1904. It is a significant fact that the trade association, organized under the agreement of July 1, 1896, was not dissolved until June 30, 1904. It had been utilized until that date by Thomas Coleman du Pont, Pierre S. du Pont, and Alfred I. du Pont in suppressing competition and thereby building up a monopoly. Between February, 1902, and June, 1904, the combination had been so completely transmuted into a corporate form that the trade association was no longer necessary. Consequently the trade association was dissolved, and the process of dissolving the corporations whose capital stocks had been acquired, and concentrating their physical assets in one great corporation, was begun. Before the plan had been fully carried out this suit was commenced. The proofs satisfy us that the present form of the combination is no less obnoxious to the law than was the combination under the trade association agreement, which was dissolved on June 30, 1904. The 28 defendants are associated in a combination which, whether the individual defendants were aware of the fact or not, has violated and still plans to violate both section 1 and section 2 of the anti-trust act. We conclude that it is our plain duty to grant such a decree as will prevent and restrain further violations of the act.

5. Third. *The third and last question therefore is: What shall be the nature of the decree?*

It must be one of dismissal of the petition as to all of the defendants except the 28 who are found to be interested in and supporters of the unlawful combination.

It is contended by counsel for the defendants that there can be no decree against the 28 defendants, for the reason that the title to the property held by the defendant corporations cannot be impaired by any decree of this court. "The most that the government in any event can claim," say the counsel, "is that prior to the organization of the [153] present defendant companies there did exist contracts and combinations in restraint of trade, and possibly a monopoly of the explosives industry in the United States, and that such combinations and monopoly were participated in by some of the corporations which were later purchased by the present

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defendants, and possibly that some of the properties that were owned by the corporations that were purchased by the present defendants had been acquired by such corporations as a result of such combinations and monopoly. * * * Even so, the corporations had title to such properties, and if such combinations and monopolies no longer exist the title to such property must be good in subsequent purchasers thereof." To support this argument *Brooks v. Martin*, 2 Wall. 71, 17 L. Ed. 782, and other cases, are referred to.

But we have found that the corporations organized after the advent into the explosives business of Thomas Coleman du Pont and Pierre S. du Pont are a part of an existing combination in restraint of interstate trade. The du Pont Company of 1902 co-operated with the advisory and special committees of the trade association from April 2, 1902, to June 30, 1904, in fixing prices, apportioning trade amongst the members of the association, allowing rebates, and forcing competitors to submit to their rule. The du Pont Company of 1903 was created to aid the combination in concentrating its power and fastening its hold on the monopoly which it had sedulously built up, and which brought to its members in the short period of six years the enormous profit of \$11,000,000 in dividends and \$12,000,000 or \$18,000,000 in its surplus account. We do not propose by our decree to deal with titles to property. Our power is defined in the fourth section of the Anti-Trust act. That section invests us "with jurisdiction to prevent and restrain violations" of the act. The same section provides that the petition may contain a prayer that the violation of law therein alleged "shall be enjoined or otherwise prohibited." It is our purpose, as it is our duty, to exert the power thus conferred on us to the extent necessary to "prevent and restrain" further violations of the act. In other words, the relief we can give in this proceeding is preventive and injunctive only. If our decree, limited to that purpose, shall necessitate a discontinuance of present business methods, it is only because those methods are illegal. The incidental results of a sweeping injunction may be serious to the parties immediately concerned; but, in carrying out the command of the statute,

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which is as obligatory upon this court as it is upon the parties to this suit, such results should not stay our hand. They should only challenge our care that our decree be no more drastic than the facts of the case and the law demand.

The dissolution of more than 60 corporations since the advent of the new management in 1902, and the consequent impossibility of restoring original conditions in the explosives trade, narrows the field of operation of any decree we may make. It should not make the decree any the less effective, however. In the *Standard Oil case* Mr. Chief Justice White said:

"It may be conceded that ordinarily, where it was found that acts had been done in violation of the statute adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, [154] 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 513. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies twofold in character becomes essential: (1) To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute; (2) the exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

Both of these remedies are as clearly demanded in the present case as they were in the *Standard Oil case*. The existing combination in the explosives trade is one in restraint of interstate commerce. Its sales board fixes prices and exercises powers which Mr. Haskell, its chairman, admits are even more extended in their scope than were the powers of the advisory and special committees which the sales board superseded on June 30, 1904, after co-operating with them from July, 1903. It has also attempted to monopolize and is attempting to monopolize, and has monopolized, and is now in the possession of a monopoly of, a large part of the explosives trade in the United States. Our decree must therefore

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be one which will forbid future acts violative of the law and compel a dissolution of the combination existing in violation of the law. To stop the business of the combination immediately, however, might be attended with very disastrous consequences. The defendants, or some of them, for example, furnish military and ordnance powders to the United States government. We understand, also, that they furnish explosives used in the construction of the Panama Canal. Their ability to continue so to do should not be destroyed before the expiration of a reasonable time for adjusting their business to the changed conditions. In the *Standard Oil* and *American Tobacco cases* six months were allowed for making the changes necessitated by the decrees entered therein. What time should be allowed in the case now in hand, and what other details should be embodied in the final decree, we cannot now determine.

The present decree will therefore be interlocutory. It will adjudge that the 28 defendants are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of section 1 of the Anti-Trust Act, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved. The interlocutory decree will further adjudge that this court, in order to obtain such further information as shall enable it to frame a final decree which shall give effective force to its adjudication, will hear the petitioner and the defendants on the 16th day of October next as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination which shall be submitted by the petitioner and the defendants, or any of them, to the end that this court may ascertain and determine upon a plan or method for such dissolution [155] which will not deprive the defendants of the opportunity to re-create, out of the elements now composing said combination, a new condition which shall be honestly in harmony with and not repugnant to the law. The interlocutory decree will further adjudge that both parties shall have leave to take such additional

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proofs as they may deem proper to be used at the hearing aforesaid. It is not to be inferred, however, that this court will sanction or supervise any new condition that defendants may re-create, or perform any other act which shall be merely administrative in its nature. *Hayburn's case*, 2 Dall. 409, 1 L. Ed. 436; *United States v. Ferreira*, 13 How. 40, 14 L. Ed. 42; *Gordon v. United States*, 117 U. S. 702, appendix.

6. We have not overlooked the motion of the defendants to dismiss the petition for want of necessary parties. It appears that certain of the defendant corporations have outstanding bonds secured by mortgages or trust deeds, held by trust companies who are not defendants. As already stated, this suit is not designed, primarily, to deal with or dispose of property rights. We see no reason for bringing in mortgage or other creditors. If, hereafter, it becomes necessary to safeguard their rights, appropriate action can then be taken.

INTERLOCUTORY DECREE.

This cause coming on to be heard before the three Circuit Judges of the Third judicial circuit in the Circuit Court of the United States for the District of Delaware, under the provisions of the expediting act of February 11, 1903, in the presence of George W. Wickersham, Attorney General of the United States, William S. Kenyon, assistant to said Attorney General, and James Scarlet and William A. Glasgow, Jr., special assistants to said Attorney General, and Frederic Ullmann for the defendants the American Powder Mills, the Miami Powder Company, and the *Ætna* Powder Company, M. B. & H. H. Johnson, for the defendant the Austin Powder Company, Frederick Seymour, for the defendant the Equitable Powder Manufacturing Company, David T. Marvel and David T. Watson, for the defendant Henry A. du Pont, Burton B. Tuttle, for the defendant the King Powder Company, and John C. Spooner, James M. Townsend, George S. Graham, William S. Hilles, and William H. Button, for the remaining defendants, and the court having read the pleadings and proofs and heard the argument of counsel, and duly considered the same; and it appear-

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ing to the court that the petitioner, the United States of America, is entitled to the relief hereinafter mentioned:

It is thereupon, on this 21st day of June, A. D. 1911, ordered, adjudged, and decreed, and this court, by virtue of the power and authority duly conferred on it by law, does hereby order, adjudge, and decree as follows, to wit:

1. That the petition be dismissed as to the following defendants, namely: *Ætna Powder Company, Miami Powder Company, American Powder Mills, Equitable Powder Manufacturing Company, Austin Powder Company, King Powder Company, Anthony Powder Company, Limited, American E. C. & Schultze Gunpowder [156] Company, Peyton Chemical Company, Henry A. du Pont, Henry F. Baldwin, California Powder Works, Conemaugh Powder Company, Metropolitan Powder Company, and E. I. du Pont Company* of August 1, 1903.

2. That the remaining 28 defendants, namely, *Hazard Powder Company, Laflin & Rand Powder Company, Eastern Dynamite Company, Fairmont Powder Company, International Smokeless Powder & Chemical Company, Judson Dynamite & Powder Company, Delaware Securities Company, Delaware Investment Company, California Investment Company, E. I. du Pont de Nemours & Co. of Pennsylvania, du Pont International Powder Company, E. I. du Pont de Nemours Powder Company, E. I. du Pont de Nemours & Co., Thomas Coleman du Pont, Pierre S. du Pont, Alexis I. du Pont, Alfred I. du Pont, Eugene du Pont, Eugene E. du Pont, Henry F. du Pont, Irene du Pont, Francis I. du Pont, Victor du Pont, Jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M. Barksdale, Edmond G. Buckner, and Frank L. Connable*, are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of section 1 of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved.

Syllabus.

3. That this court, in order to obtain such further information as shall enable it to frame a final decree which shall give effective force to its adjudication, will hear the petitioner and the defendants on the 16th day of October next as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination which shall be submitted by the petitioner and the defendants, or any of them, to the end that this court may ascertain and determine upon a plan or method for such dissolution which will not deprive the defendants of the opportunity to re-create, out of the elements now composing said combination, a new condition which shall be honestly in harmony with and not repugnant to the law.

4. That both parties have leave to take such additional proofs as they may deem proper to be used at the hearing aforesaid.

5. That, until the entry of final decree herein, said 28 defendants hereinabove last named are, and each of them is, and the agents and servants of them are jointly and severally hereby enjoined from doing any acts or act which shall in any wise further extend or enlarge the field of operations or the power of the aforesaid combination.

(Signed)

GEO. GRAY,
JOS. BUFFINGTON,
W. M. LANNING,

Circuit Judges of the Third Judicial Circuit.

[536] UNION CASTLE MAIL S. S. Co., LIMITED,
ET AL. v. THOMSEN ETAL.

(Circuit Court of Appeals, Second Circuit. July 26, 1911.)

[190 Fed. Rep., 536.]

APPEAL AND ERROR (§ 1177)—REVERSAL—DISPOSITION OF CAUSE—

Where counsel in the trial of a cause and the court in its charge to the jury proceeded on an erroneous construction of the statute on which the action was based, an appellate court will not undertake to determine the case on the evidence in the record, but will remand for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.]

Coxe, Circuit Judge, dissenting.

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In error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Hugo Alberto Thomsen and others against the Union Castle Mail Steamship Company, Limited, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the defendants in error, who were plaintiffs below, in an action for the recovery of treble damages under the Federal Anti-Trust Statute. The case was before this court before (166 Fed. 251) upon a writ of error sued out by the plaintiffs because their complaint was dismissed.

J. Parker Kirlin and *Thomas Thacher*, for plaintiffs in error.

Lorenzo Uilo, for defendants in error.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge.

When this case was in this court before we said, upon the authority of the decisions of the Supreme Court as we then interpreted them, that whether the restraint of trade imposed by the combination in question was reasonable or unreasonable was immaterial. It is also apparent from the record that the Circuit Court upon the second trial in holding as a matter of law that the combination shown was in violation of the statute, acted upon the same view of the law.

In the light of the recent decisions of the Supreme Court in the *Standard Oil* (221 U. S. 1, 31 Sup. Ct. 502, 56 L. Ed. 619) and *Tobacco* (221 U. S. 106, 31 Sup. Ct. 682, 56 L. Ed. 668) cases, the construction so placed upon the statute by this court and the Circuit Court must be regarded as erroneous and a new trial must be granted unless the contentions of the parties are correct that, upon the facts shown, this court can now determine the legality of the combination.

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It is, however, on the one hand, impossible for us to hold as a matter of law that the acts of the defendants as disclosed upon the present record amount to a combination in unreasonable restraint of trade. And, on the other hand, we think that it would be unduly prejudicial to the plaintiffs to reverse the judgment with instructions to dismiss the complaint. The plaintiffs presented their case in view of the decision [537] of this court that the reasonableness of the restraint imposed was immaterial and it would be most unjust to dismiss the complaint because their proof did not conform to another standard. Upon another trial the plaintiffs may be able to produce additional testimony tending to make out a case within the Supreme Court decisions referred to.

The judgment of the Circuit Court is reversed and a new trial ordered.

COX, Circuit Judge (dissenting).

I am unable to agree with the majority. Courts are organized to reach results within a reasonable time. This action was begun eight years ago, it has been tried twice, the last trial occupying five days; it has been argued twice in this court. In such circumstances it is obvious that the labor of so many years should not be set at naught unless manifest error compels it.

The sole reason assigned for reversal is that this court stated in its former opinion, what was unquestionably the law at that time, that where it was shown that a contract, combination or conspiracy actually restrained trade or commerce, it was immaterial whether such restraint was reasonable or unreasonable. It is asserted that the trial judge followed this view of the law in holding that the combination in question was in violation of the statute and that his ruling in this regard was error. I am unable to discover the ruling, exception or assignment of error which supports this contention or presents this question. As the evidence of the unlawful conspiracy is in writing, there was no controverted fact regarding its terms. Clearly it was the duty of the court and not of the jury to construe this uncontradicted

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evidence. The only question of fact which it was necessary to determine, in order properly to interpret the agreement between the carriers, was submitted to the jury with clear and careful instructions. The judge charged as follows:

"Now the right of recovery herein depends upon whether the rate charged the plaintiffs was reasonable or unreasonable, and if it was unreasonable, all the defendants, by their unlawful combination in restraint of trade, coerce or compel the plaintiffs to pay a rate greater than a reasonable rate, simply to effectuate the primary purpose of the combination, namely, to prevent competition in the transportation of merchandise. * * * Now, gentlemen, notwithstanding the fact that I have stated to you as matter of law that this was a combination forbidden by the Sherman Act, the question submitted to you is whether the rate was reasonable or unreasonable, and that is a question to be determined by you, and it is for you to say whether the 10 per cent was charged to coerce the plaintiffs to patronize the same ships or not. * * * If, in your judgment, the rate charged by these lines during this period of time was not excessive, if it was reasonable and just, in view of the conditions and circumstances to which I will refer hereafter, then that ends the case, and you will pay no further attention to any of the questions here involved, for in that event, your verdict will be for the defendants."

There is much more to the same effect but the foregoing is sufficient.

The language of the court seems almost prophetic of the rule of the recent decisions of the Supreme Court. If the *Standard Oil* and *Tobacco* decisions had been before him while delivering the charge, it is not easy to see how the judge could have followed them more accurately. We have, then, a combination which the jury has found restrained trade by the imposition of excessive and unreasonable charges. In other words, a combination forbidden by the law, whether the "rule of [538] reason" be or be not applied. No one pretends that any new facts will be presented at a new trial. Should one be ordered, the case will appear for a third time in this court upon the same facts and we will then have to render a decision which should, in my judgment, be rendered now.

In its last analysis, the question, whether the agreement in controversy is within the prohibition of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901,

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p. 3200]), is one of law for the court and should be answered without further delay. The alleged error considered by the majority is not presented by the record but, even if it were, the question is one of law which should be disposed of by the court on the present record.

[631] STEELE v. UNITED FRUIT CO. ET AL.

(Circuit Court, E. D. Louisiana. June 12, 1911.)

[190 Fed. Rep., 631.]

MONOPOLIES (§ 24)—ACQUISITION OF CONTROL OF COMPETING CORPORATIONS—FOREIGN COMMERCE.—Evidence held to warrant findings that defendant fruit company, engaged in foreign commerce, acquired a controlling interest in a competing steamship corporation to control its operation, prevent competition and the increase of its business by the addition of new capital, and that a subsequent sale of such stock to individuals was formal only, and not intended in good faith to divest the fruit company of its control, authorizing an injunction restraining it or the purchasers from voting the stock in the fruit company's interest.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.]

MONOPOLIES (§ 21)—PURCHASE OF STOCK—VALIDITY.—Purchase by one corporation engaged in foreign commerce of a controlling interest in the stock of a competing company similarly engaged, for the purpose of eliminating competition, though invalid in so far as the right to vote the stock is concerned, does not invalidate the stock so as to preclude the purchasing company from transferring the same to another in good faith, and conferring the right to vote the stock so transferred on the purchaser in case the transfer is without suspicion of retained control, and the purchaser is not otherwise prohibited by law from voting the stock.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 21.

Rights and liabilities of parties contracting with trusts or combinations in restraint of trade, see note to Chicago Wall Paper Mills v. General Paper Co., 78 C. C. A. 612.]

In Equity. Bill by Frederick M. Steele against the United Fruit Company and others. On exceptions to the report of the master. Overruled.

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E. D. Owen, W. L. Hughes, and Rouse, Grant and Grant,
for complainant.

Howe, Fenner, Spencer and Cocke, for United Fruit
Company.

Dufour and Dufour, for Charles and Jacob Weinberger.

Farrar, Jonas, Goldsborough and Goldberg, for Bluefields
Steamship Company.

FOSTER, District Judge.

On December 3, 1909, Frederick M. Steele, a stockholder of the Bluefields Steamship Company, filed his bill against the United Fruit Company, against Andrew W. Preston, Minor C. Keith, and Bradley W. Palmer, its president, vice president, and secretary, respectively, against Crawford H. Ellis, its agent in New Orleans, against the president and other officers of the Bluefields Steamship Company, and against Charles and Jacob Weinberger. The bill is voluminous, and sets up generally that the United Fruit Company is an unlawful combination; that, having acquired the majority of the stock of the Bluefields Steamship Company, it had thereby controlled it for the purpose of suppressing competition with itself and to create a monopoly, in violation of the laws of [632] Louisiana and of the United States; that the United Fruit Company had no capacity to take title to, nor right to hold and vote, the stock of the Bluefields Company; that it had assigned all of its stock to Charles and Jacob Weinberger, one-half to each, and that the assignment was fraudulent and a sham and was only to enable the Weinbergers to vote the stock in the interest of the United Fruit Company and according to its instructions, for the purpose of continuing its control of the Bluefields Steamship Company. The bill also sets out a number of specific acts, violative of the neutrality laws of the United States, alleging the same to be intentionally and fraudulently done on the part of the officers of the Bluefields Company at the

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instance of the United Fruit Company, for the purpose of causing the Bluefields Company to lose a valuable concession in Nicaragua, to wit, the right to exclusive navigation of the Escondido river. The bill also charges fraudulent mismanagement generally against the officers of the Bluefields Company, at the instance of and for the benefit of the United Fruit Company, and prays that the United Fruit Company and Charles and Jacob Weinberger be enjoined from claiming any right, title, or interest in the said stock, from interfering in any way with the business of the Bluefields Steamship Company, and from voting the stock at any meeting, and that a receiver be appointed pending the litigation. On this application, in view of the extraordinary allegations of the bill, and of the war then raging in Nicaragua, a receiver was appointed for what legal effect the appointment might have, but he was ordered not to take physical possession. On December 8, 1909, an amended bill was filed, which amplified the allegations of the original bill. On January 17, 1910, Simon, Emanuel, and Adolph Steinhardt, also stockholders of the Bluefields Steamship Company, filed a cross-bill, praying for substantially the same relief as Steele, and on the same date Adolph Segal filed an intervention, joining the complainant, Steele, and praying for the same relief. In due course the defendants filed answer, denying the allegations of the bill and other pleadings and affirming the good faith of the sale and transfer of the United Fruit Company's stock to the Weinbergers. After a hearing, the appointment of the receiver was maintained, and he was directed to take charge of all the assets of the Bluefields Steamship Company, and the preliminary injunction issued as prayed for. The case was then referred to a master to take the evidence and report his findings of fact and conclusions of law thereon, and is now before me on final hearing on exceptions to his report.

The proceedings before the master took a wide range, but in his able and painstaking report he has endeavored to deal specifically with all of the contentions of the parties and to find the facts with particularity, those collateral as well as those material to the main issues. The master reduced his

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conclusions to some 51 special findings of fact. To these facts the defendants have filed 37 exceptions, divided into many subheads, and the complainants have filed some 17 exceptions. The exceptions to the master's report are largely to his findings of collateral facts, and principally to his deductions therefrom. Some are directed only at his choice of language, and others complain that he did not find the facts regarding incidental transactions more in detail. Had counsel followed the better practice of filing their exceptions before the master, doubtless he would have corrected his report to conform more nearly to their views. Most of the exceptions are unimportant and need not be further noticed. Those I consider material will be referred to later.

It is undisputed, however, that the Bluefields Steamship Company was organized December 28, 1897, as a Louisiana corporation, with an authorized capital stock of \$100,000, all of which was issued before January 1, 1899; that the company was engaged in the banana importing business from Bluefields, Nicaragua, to the United States; that the United Fruit Company was incorporated March 30, 1899, under the laws of New Jersey, and in June, 1899, entered into competition with the Bluefields Steamship Company, operating one ship a week from Bluefields; that on September 20, 1899, the United Fruit Company consolidated with six other New Jersey corporations, all engaged in the fruit business, and Messrs. Andrew W. Preston, Minor C. Keith, and Bradley W. Palmer became, respectively, its president, vice president, and secretary, as well as directors; that in October, 1899, after the said consolidation, the United Fruit Company acquired, in the name of its president, one-half of the outstanding stock of the Bluefields Steamship Company—500 shares—and at the same time there was assigned to him an additional share for voting purposes; that the said competition ceased, and three employees of the United Fruit Company were elected directors of the Bluefields Company, the board consisting of six members, and so maintained continuously until 1907, during all of which time the United Fruit Company or its officers controlled the election of all the directors of the Bluefields Company by a clear majority vote

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of all the capital stock in existence; that on August 31, 1907, the United Fruit Company disposed of 4 shares of its stock, and its three employees resigned from the board of the Bluefields Steamship Company, but the United Fruit Company continued to vote its stock, and all elections for officers of the Bluefields Company were unanimous; that in 1909, before this suit was filed, the United Fruit Company purchased 70 additional shares of the stock of the Bluefields Steamship Company, which gave it 53 per cent of all the stock of the company issued.

[1] From these facts the conclusion is irresistible that the object of the United Fruit Company in first acquiring the stock was to control the competition of the Bluefields Steamship Company, and, no matter what may have been its intention during the period between 1907 and 1909, with the acquisition of the additional stock in September, 1909, the power of absolute control returned, and it is plain that the injunction should be perpetuated against the United Fruit Company, if it has now any interest in the Bluefields Company's stock. *Factors' & Traders' Ins. Company v. New Harbor Protection Patrol*, 37 La. Ann. 233; *State ex rel. Jackson v. Newman*, 51 La. Ann. 838, 25 South. 408, 72 Am. St. Rep. 476; *Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 486, 48 L. Ed. 679. It appears, however, that the United Fruit Company, on September 15, [634] 1909, transferred all of its Bluefields Company holdings to Charles and Jacob Weinberger by a written contract, which was amended on December 31, 1909, while the litigation was pending.

The undisputed facts relevant to this transfer are as follows: Charles and Jacob Weinberger became stockholders in the Bluefields Steamship Company at its formation and owned, together with a third brother, one-third of its capital stock. They were active in securing control of the corporation for the United Fruit Company, and sold it one-half of their stock in October, 1899. Charles Weinberger was put in sole charge of the New Orleans division of the Fruit Dispatch Company, a subsidiary corporation of the United Fruit Company controlled by it, in June, 1902, and is still so employed. Jacob Weinberger had no active connection

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with the fruit business in Nicaragua from June, 1905, to September, 1909, and he was then engaged, over the protest of some of the minority stockholders, to go to Nicaragua merely to look into the affairs of the Bluefields Company and make a report, at a salary of \$416.67 per month. In the early part of 1909 the United Fruit Company was advised by its counsel that it probably could not vote any of the Bluefields stock standing in its name and in the name of its officers. Jacob Weinberger learned of this advice, and tried to buy all of its Bluefields stock, but was unsuccessful. As early as December, 1906, Charles and Jacob Weinberger were unable to pay their debts, and in August, 1909, while still apparently insolvent, all of their Bluefields stock, which was then pledged to the State National Bank, with the exception of 38 shares, was sold by the liquidators of the bank to Steele with the knowledge of Charles Weinberger and without objection on his part. At about the same time Steele began buying Bluefields stock in August, 1909, the local manager and local attorney of the United Fruit Company suggested to the Weinbergers that they might make arrangements for buying the United Fruit Company's stock, and by the agreement of September 15th the United Fruit Company transferred to the Weinbergers 686 shares of Bluefields stock for the price of \$450 a share, and further agreed to deliver and sell to them 70 additional shares at the same price. The United Fruit Company was compelled to buy the 70 additional shares for cash, and paid more for them than it sold them for. The stock transferred constituted 58 per cent of all of the stock of the Bluefields Steamship Company. The sale was made on terms of 10 years' credit, payable in equal annual installments, no cash was paid at all, and the United Fruit Company retained the right to rescind the sale at any time. The Weinbergers on their part agreed that the voting power of the stock should be used to elect a director nominated by the United Fruit Company and to amend the charter so that the directors and other officers would hold office at the will of the stockholders, and that all of their acts should require the ratification of a majority of the stockholders; that no extraordinary or unusual indebtedness should be incurred except with the consent of this director,

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the president, or vice-president of the United Fruit Company; that the capital stock should not be increased or diminished except by consent in writing of the president, or the vice-president, [635] or the executive committee of the United Fruit Company. During the pendency of this suit, the parties amended this agreement with the view to eliminate all clauses supposed to be objectionable to the court, but the sale still remains as one entirely on ten years' credit, with a provision for foreclosure and sale of the stock without judicial proceedings on default of any payment of principal or interest, or in the event of the purchasers' bankruptcy.

With regard to this transfer, the master found, as evidenced by his twenty-first, fortieth, and forty-first findings of fact, that the sale to the Weinbergers was coupled with the retained control of the voting power of the stock in the United Fruit Company, and that its purpose was to vest the control of the Bluefields Steamship Company in a stockholder under obligations to the United Fruit Company, one that could be relied upon to carry out its wishes, and that it did not divest the United Fruit Company of the control of its 756 shares referred to, and was not intended by the parties to do so. The defendants have excepted to the master's said findings of fact on the ground that the uncontradicted and unimpeached testimony of all the parties to the transaction shows that it was a real transfer, and was intended by all of the parties to divest the United Fruit Company both of its ownership and control of the stock.

It is difficult, to my mind, to conceive how a more complete control could be retained or exercised than was contemplated by the original agreement. Conceding that it was the intention of the United Fruit Company to transfer to the Weinbergers the complete ownership of the stock at the expiration of the credit period, it is manifest that, without the consent of the United Fruit Company, there was no possibility of the Bluefields Steamship Company increasing or expanding its business, or attracting new capital, and all the time the power to control, or even entirely eliminate it, was in the hands of the United Fruit Company. And the amendment of December 31 does not materially change the situation, for unless the Weinbergers paid some \$51,000 in principal

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and interest at the end of the first year the United Fruit Company could foreclose. In the preceding ten years the Bluefields Company's profits had averaged about \$60,000 a year, and on the same basis the Weinbergers' share would not be over \$32,000. They were insolvent, and in the ordinary course of events they could not have met this payment. In view of all the circumstances peculiar to this transaction and the relationship of the parties, the physical and other facts may well outweigh the testimony of the parties, conceding to them the utmost good faith, for the agreement, if allowed to stand, would have to be interpreted by them, and the deep obligation of the purchasers to the United Fruit Company would necessarily lead them to conform to its wishes. It is certain that the United Fruit Company could not vote the stock held in its name, and two courses were open to it: One, to retain it quiescent, and the other to divest itself entirely of its ownership and control. If it intended to do the latter, it was not its concern who might control the Bluefields Company, and therefore the mere fact that, in order to deliver a clear majority, it bought stock for cash, which it subsequently sold for a smaller price on credit to two of its close [636] friends, who were at the time insolvent, indicates very plainly the real reason for making the transfer.

It is due to the defendants to say, however, that complainants failed to prove the allegations of the bill, charging intentional violations of the neutrality laws, and the master undoubtedly so intended to hold in his thirty-fifth finding. But I do not consider these allegations material to the issues now before me, nor did I so consider them at the time of confirming the receiver's appointment.

There appears to be evidence to sustain all of the master's findings of fact, though I have not examined with particularity those matters not bearing directly on the main issues before me. The findings of a master are entitled to great weight, especially when he has seen and heard the witnesses, and I am not disposed to disturb the findings in this case.

[2] I am not called upon to say anything further at present, but for the information of the master and the parties I had perhaps better express my opinion as to all the points

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raised. It has been urged with great earnestness and vigor by counsel for complainants that the contract by which the United Fruit Company acquired its stock was illegal, and it acquired nothing; that the stock standing in its name is void and it can transfer nothing, and that in any event, not having the right to vote the stock, it could not transfer the right to a purchaser. It may be that such a solution of the trust problem is desirable, but I cannot see my way clear to adopt complainants' contentions in the absence of a positive statute, especially in view of the expressions of the Supreme Court in the cases of *Harriman v. Northern Securities Company*, 197 U. S. 298, 25 Sup. Ct. 493, 49 L. Ed. 739, the *United States v. Standard Oil*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, and the *United States v. American Tobacco Company*, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, recently decided. The authorities cited by complainants would perhaps be persuasive if their first premise was correct, but the Supreme Court has clearly drawn the distinction, thin though it may be, between unlawful contracts and those incidental and collateral to them. The contract of sale by which the United Fruit Company acquired this stock was not of itself illegal and it undoubtedly acquired the ownership subject to the restrictions the law has placed upon its use. *Continental Wall Paper Company v. Voigt*, 212 U. S. 258, 29 Sup. Ct. 280, 53 L. Ed. 486; *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

I therefore must hold that the United Fruit Company has the right to dispose of its stock, and the purchaser will be entitled to vote it, provided the transfer is entirely without suspicion of retained control, and he is not otherwise prohibited by law to do so.

The exceptions to the master's report will be overruled, and in accordance with his recommendations there will be a decree, dissolving the preliminary injunction herein, so as to permit the holding of an election of officers of the Bluefields Steamship Company, but maintaining it in all other respects, and ordering said election to be held before the master and under his control, the receiver to be maintained and jurisdiction to be retained by the court until further orders.

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[172] UNITED STATES v. STANDARD SANITARY MFG. CO. ET AL.

(Circuit Court, D. Maryland. October 13, 1911.)

[191 Fed. Rep., 172.]

MONOPOLIES (§ 17)—ANTI-TRUST ACT—CONTRACTS IN RESTRAINT OF TRADE.—Sixteen corporations, producing 78 per cent. of all the sanitary enameled iron ware, such as bath-tubs, sinks, etc., made in the United States, by mutual agreement previously made, entered into contracts by which they bound themselves to sell only certain grades of the ware only at prices and on terms fixed in schedules attached, or by a committee, and only to jobbers who should sign the resale contract prepared by them. Such contract was signed by 80 per cent of the jobbers in the United States, and bound them to purchase only from some one of the 16 manufacturers, and to sell only at prices named in their resale price lists. *Held*, that such contracts entered into by the manufacturers were solely for the purpose of fixing prices and destroying competition, and constituted a combination in restraint of interstate commerce, and an attempt to monopolize such commerce, which was unlawful, as in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).^a

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

MONOPOLIES (§ 14)—ANTI-TRUST ACT—ILLEGALITY OF CONTRACTS—RESTRAINT OF COMPETITION.—Where the necessary effect of an agreement between manufacturers is clearly to restrain interstate trade within the purview of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), it cannot be taken out of the category of the unlawful by general reasoning as to its expediency or nonexpediency or the wisdom or want of wisdom of the statute.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 14.]

[173] **MONOPOLIES (§ 14)—ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—EFFECT OF USE OF PATENTED DEVICE.**—A combination between a large majority of the manufacturers of enameled iron ware in the United States for the purpose of fixing prices, and which is clearly in restraint of interstate trade, is not saved from illegality under the Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), by the fact that the contracts creating the combination were embodied in licenses to its members to use a patented automatic dredger, which was a useful and time-saving tool used in finishing the ware to

^a Syllabus copyrighted, 1912, by West Publishing Co.

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sprinkle the last two or more coats of powdered enamel on the heated iron; the ware itself being unpatented, and the enameling being but one of several operations required in its production, to which operation even the patented dredger was not essential, but merely an improvement on the hand operated dredgers of the prior art, still in use in some factories.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 14.]

MONOPOLIES (§ 8)—ANTI-TRUST ACT—USE OF PATENTED ARTICLE.—In spite of the Sherman act, the patentee may monopolize for the term of his patent the thing which he or his assignor invented. If by the common law, or the statutes of a state, or by the enactments of Congress, men are forbidden to restrain trade or to monopolize it, a patentee may not restrain trade or attempt to monopolize it in anything except that which is covered by his patent.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 8.]

MONOPOLIES (§ 24)—ANTI-TRUST ACT—SUIT TO ENJOIN VIOLATION—PENDENCY OF CRIMINAL PROSECUTION.—Unless in an exceptional case, a federal court of equity will not postpone the hearing and decision of a suit brought by the United States under Sherman Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), to enjoin violation of the act to await the determination of a criminal prosecution against some of the same defendants based on the same alleged violations.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.]

COMMERCE (§ 40)—INTERSTATE COMMERCE—WHAT CONSTITUTES.—A manufacturing company which makes its product in one state and stores it in warerooms in other states, where it is sold, the trade extending over several states, is engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40.]

MONOPOLIES (§ 24)—ANTI-TRUST ACT—SUIT FOR VIOLATION—PARTIES.—Officers of corporations which entered into an illegal combination in restraint of interstate commerce, who personally took no part in the formation of such combination, are not proper parties defendant in a suit against the corporations for an injunction under Sherman Anti-Trust Act July 2, 1890, c. 647, § 4, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201).

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 24.]

Goff, Circuit Judge, dissenting.

PATENTS (§ 1)—DEFINITION.—A patent is a grant of a right to exclude all others from making, using, or selling the invention covered by it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 1; Dec. Dig. § 1.

For other definitions, see Words and Phrases, vol. 6, pp. 5228-5231; vol. 8, p. 7748.]

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In Equity. Suit by the United States against the Standard Sanitary Manufacturing Company and others. On final hearing. Decree for complaint.

[174] *Edwin P. Grosvenor, John Philip Hill, and James A. Fowler*, for the United States.

Herbert Noble, William L. Marbury, and Hartwell P. Heath, for Standard Sanitary Mfg. Co. and others.

Robert B. Honeyman, for Colwell Lead Co.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge.

The United States brings this suit. It will be called the government. Its petition is filed under the fourth section of the Sherman Anti-Trust Act. It charges that the defendants have violated the first and second sections of that act. It says that they have conspired to restrain interstate trade in sanitary enameled iron ware, and have attempted to monopolize such trade therein. All the defendants are concerned in making and selling that ware. It is made of cast iron. It is coated with enamel. It has the appearance of being porcelain lined. Bath-tubs, lavatories, closet-bowls, and tanks, sinks, and urinals are among the more important articles made of it. It will be referred to as the ware.

There are 50 defendants. Sixteen are corporations. They will be called the corporate defendants. Thirty-four are individuals. They are styled individual defendants. One of them is Edwin L. Wayman. With him each of the corporate defendants made an agreement. These agreements the government says restrain trade in the ware, and attempt to monopolize it. The other 33 individual defendants are officers of the corporate defendants. The government charges that they each were among the persons who knowingly caused the corporate defendants to do that of which it complains.

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These 16 agreements were, with exceptions to be mentioned, identical in their language. At least 15 of the 16 corporate defendants had directly or indirectly taken part in drafting the common form. They were executed by nearly all the corporate defendants on the same day and at the same place. No defendant entered into the agreement without knowing that at least 13 of the other corporate defendants had executed it, or intended so to do. Without this knowledge no one of them would have become a party to it. Each of these agreements is in the form of a license granted by Wayman accepted by a corporate defendant. The patents under which the licenses purported to be granted were first put into Wayman's name two days before most of the agreements were executed. The terms of the agreements had been definitely settled at least two weeks earlier. There were three patents. They all were for automatic dredgers. A dredger is a tool used in the enameling step of making the ware. The licenses were granted for a period of two years, beginning June 1, 1910. Each licensee promised on the 5th day of each month to pay \$5 a day for each furnace used by it for the making of the ware during the preceding month. Wayman [175] undertook that he would three months later pay back \$4 out of every \$5. This undertaking was conditioned upon the licensee having in the meantime done all he had agreed to do. There are about 25 working days a month. Wayman on the 5th of every month, therefore, received \$125 for each furnace continuously operated during the preceding month by any one of his licensees. One hundred dollars of this he was eventually to pay back. This repayment was not to be made until three months had gone by. After the first four months, he would always have in his hands \$300 of his licensees' money for every furnace of theirs in steady use. As it actually turned out, he usually held between \$40,000 and \$50,000 belonging to them. This money was in the nature of cash bail. Each corporate defendant in this manner gave security that he would keep his bargain, or be good, as one of the licensees expressed it. Each corporate defendant promised to do three things: (1) It would not sell any "seconds" or "Bs" of any of the ware except bath-tubs.

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It apparently reserved the right to market what the trade calls "non-guaranteed" bath-tubs. (2) It would not sell any ware to any jobber who did not sign the jobbers' resale agreement to be presently described. (3) It would not sell anybody any ware at a lower price or upon more attractive terms than those named in the agreement or in a schedule attached to it. This schedule named standard prices for each article of the ware and for each size, shape, and grade of that article. All the corporate defendants promised that they would not sell some articles below the scheduled price. Some of them undertook not to sell any articles below these prices. Some of the corporate defendants had not the established reputation of others, or they had not as efficient a selling force. They would not take licenses unless they were allowed to sell some articles at a little lower price than those quoted by their stronger rivals. After much negotiation, it was settled by a committee of the corporate defendants that some of them should be allowed to sell some articles at a discount of $2\frac{1}{2}$ in some instances, of 5 per cent in others, from the scheduled prices. The permission to give this discount, granted to some of the corporate defendants and not to others, was the only respect in which there was any difference among any of the agreements as executed. The negotiation as to which of the corporate defendants should be allowed by the others to give these preferential prices to their customers and how great the permitted discount should be was finished before any of the agreements were executed and before any of the patents had been put in Wayman's name. The re-sale agreement which the jobber in the ware was required to sign bound him in two respects: (1) He could not buy any ware from any one other than the corporate defendants. (2) He could not sell ware to anybody at a lower price or on more attractive terms than those named in the re-sale price lists.

The principles upon which these re-sale prices were to be worked out in detail had been agreed upon between Wayman and a committee chosen by nearly all of the corporate defendants. This agreement was reached before any licenses were accepted, and before any of the patents had become Wayman's. The licenses provided that no

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changes in the sale or re-sale prices could be made without the consent of Wayman and the majority of a committee elected by the corporate defendants. The agreements restricted in a number of ways the freedom of both the corporate defendants who made the ware and the jobbers [176] who sold it to the plumbers. An article of the ware must always be billed separately from other goods sold at the same time to the same person. Many articles could not be shipped uncrated. No allowance could be made for a returned crate and so on. There were jobbers to whom these rules or some of them were distasteful. Dealers were forced to change their methods of doing business which they had followed for years to the mutual satisfaction of themselves and their customers. These requirements had a purpose. Competition in price cannot be altogether shut off unless everybody is made in some respects to do business in precisely the same way as everybody else. Each jobber, like each maker, was called on to give cash security that he would carry out his bargain. He had to pay 5 per cent more for the ware than the maker expected to get out of it. If he had not cut prices and had not bought ware from any one other than the corporate defendants at the end of the calendar year, he was entitled to receive a rebate of 5 per cent on the amount paid by him during the year. If his purchases from all the corporate defendants combined had amounted to as much as \$30,000, his rebate was to be at the rate of 10 per cent. Applications for rebates were to be made to Wayman. When he approved them, they were paid by the corporate defendant or defendants which had sold the applicant the ware. Nearly 400 jobbers signed these agreements. They constituted more than four-fifths of all the jobbers in the country. The consumption of the ware is large. Wayman doubtfully estimated the annual value of the national output of it at \$14,000,000. It is hardly less than \$10,000,000. It may be much more. Upwards of 80 per cent of the jobbers took licenses. They probably handled at least 80 per cent of the product; that is, their total yearly purchases from the corporate defendants must have footed up about \$8,000,000. A rebate of 5 per cent on \$8,000,000 amounts to \$400,000 of 10

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per cent to \$800,000. Towards the close of every calendar year the corporate defendants would among them hold in the neighborhood of half a million of the jobbers' money. Moreover, the agreements told the jobbers in plain words that, if they cut prices or bought ware from anybody other than the corporate defendants, none of the latter would sell them again. There were jobbers who did not like some of the new rules. Some of them thought their money would be more useful in their own bank account than in that of the corporate defendants. A little less than one-fifth of them refused to sign the agreements.

On the other hand, there was from the jobbers' standpoint much that was attractive in the scheme as a whole. Competition had been fierce. It had not always been either wise or honest. A badly made article may look well enough to deceive the average householder. Many such had been put on the market. When the defects were speedily discovered, the jobber might have to take back the article. The cost of doing so ate up the profit on a number of like articles which were not returned. There was little profit in handling the ware. If every dealer signed the agreement, none of them could gain by taking from the makers and putting off on the public any ware except bath-tubs, not standard of its kind. The lowest price the mak[177]ers could take would buy a good article. No one would have a "second" if for the same money he could get a standard. Moreover, while non-guaranteed bath-tubs could be sold, the price below which they could not be sold was fixed. The jobbers would therefore insist on getting the best of that not very good grade. With the worst made articles taken out of the market, friction with customers would be lessened. The reputation of the ware would be raised. Every jobber would know that he was buying and selling on the same terms as his competitors. He could tell to the fraction of a cent what his gross profit on every article sold by him would be. He could regulate accordingly his expenditures for handling and advertising it. If he did not take a license, he took large chances. No one of the corporate defendants would sell to him.

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Of 250 furnaces in the country the defendants owned 195, or 78 per cent. In drawing building specifications architects frequently called for ware made by a particular manufacturer. A jobber who could not furnish a plumber with what he wanted for a large job was likely to lose his custom altogether. May, 1910, must have been a trying time for jobbers with a stubborn liking for independence, and a taste for managing their own business in their own way. As already stated, in the end four out of every five of the jobbers signed up. Many of them did so willingly and even enthusiastically. It is probable that the large majority of them welcomed the chance of doing so. Their associations had been urging the manufacturers to put in force a re-sale arrangement. A number of them have testified that they wanted it. While it lasted, they say they found it pleasant and profitable. In consequence of these proceedings and of other action taken by the government, the corporate defendants on January 1, 1911, suspended so much of the agreements as fixed original and re-sale prices. Many of the jobbers regret the suspension.

With whatever of enthusiasm, with whatever of reluctance, the makers of nearly four-fifths of the ware and more than four out of every five dealers in it became parties to the combination. The corporate defendants, and many, if not most, of the jobbers, were engaged in interstate commerce in the ware. Such commerce was directly restrained by the agreements. The makers who became parties to them could no longer sell the jobbers who did not. The jobbers who did could no longer buy from the makers who did not. The defendants did their best to get all the makers of importance and all the dealers to become parties to the scheme. If they had succeeded, Wayman and a committee of the corporate defendants would for two years from June 1, 1910, have been able to say that no man anywhere in the United States should buy a bath-tub or any other article of the ware at a lower price than it might have suited them to fix. If the trade would then have been monopolized, the defendants attempted to monopolize it.

The important questions in the case are two: (1) Would such a combination as was attempted, and in large part

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brought about, have violated the Sherman Act, had patents on automatic dredgers played [178] no part in it? (2) If it would, did the part played by those patents make lawful what otherwise would have been forbidden?

The defendants argue that not every agreement to fix and maintain prices in interstate commerce violate the Sherman Act. They say that eyes illumined by the light of reason will see that what the defendants did was from the standpoint of the public interests good, and not evil. They contend that the jobbers were making little profit on the ware. It was troublesome and costly to handle. "Seconds" were on the market. The ware was getting a bad reputation. If the defendants had not done what they did, there would soon have been no trade either to restrain or to monopolize. There is little in the record to support this contention. Such an apprehension is vaguely expressed by some witnesses. If there had been marked falling off in the sale of the ware, the defendants know it. They could have shown it by definite and precise figures. They made no attempt to do so. If there was any such danger, it was very remote, far too remote to justify the defendants in doing anything which except for it would have been unlawful. That there was any real danger at all is not shown. According to the defendants, the public gained by what was done even upon the assumption that, if it had been left undone, the trade would have continued in undiminished volume. The ultimate purchaser of the ware seldom knows whether he gets a well-made article. To his eyes it may look well. He may think that it will for years be useful, sightly, and sanitary. In a few months he may find that it is wearing badly, and has become unsightly. He may have reason to fear that to some extent it has become dangerous to the health of himself and his family. He suffers from the greed of the maker, the jobber, or the plumber, or of two or all of them. He will be in no danger from that greed when no one of them can any longer make any money by selling him a bad article for the price of a good. Human nature being what it is, no other effective protection can be given him. If the so-called "seconds" and "Bs" are put upon the market at all, most of them will in the end be bought by people who do not know

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what they are buying. It is useless, according to this argument, to call the makers together and ask them to stop selling such goods. Resolutions pledging all the manufacturers to stop making and selling them, it is true, may be easily passed. They will be adopted with enthusiasm or with solemnity according to the mood of the moment, but always with absolute unanimity. Like so many other gentlemen's agreements, they will be straightway broken.

If an enforceable bargain can be made that no goods shall be sold below a certain fixed price, which will yield a reasonable profit on a first-class article, jobbers and plumbers can be depended upon not to pay that price for an inferior article. The defendants say that in no other way can seconds be taken off the market and kept off. They point to what happened after January 1, 1911, when the price-fixing provisions of the agreement were suspended. The prohibitions against selling "Bs" and "seconds" were still in full force. Nevertheless the defendants' witnesses say that the market was at once flooded with low-grade ware. Much of it came from some of the corporate def[179]endants. It may be better for the public to pay a higher price for better ware. Most individuals find that it is usually cheaper in the end.

Still, two questions remain: (1) Does the law permit the additional price which the public is to pay to be fixed by a combination of dealers even if the latter do so, because they cannot in any other way keep some of their own number from selling bad ware for good? (2) Has the experience of mankind led them to believe that to permit all the makers and dealers in articles of common use to combine to fix the prices and terms below which those goods may not be sold will tend in the long run to improve the quality of the goods?

The second question is not for the courts. The learned counsel for the defendants say that the first need not be answered in this case. They claim that prices were not raised by the defendants. They assert that the evidence shows that they were in fact lowered. The contention rests on a statement of Wayman. He says that the prices as fixed were intended to be on an average about 5 per cent below those named in the last previously published price list of the de-

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fendant, the Standard Sanitary Manufacturing Company. The counsel for the defendants in supposing that Wayman meant that he reduced the then actually prevailing prices have misapprehended the market conditions. They assume that the Standard and the other corporate defendants were in fact getting the prices set forth in their catalogue. The record shows that they were not. Whether they ever had does not appear. They certainly had not during any of the period as to which the record speaks. If in the winter and spring of 1910 those prices had prevailed, there would have been no agreements and consequently no case. The agreements as made became fully operative June 4, 1910. No witness says that the published list prices had for many months been generally paid. The evidence is overwhelming that they had not.

On August 4, 1909, Wayman became commissioner or actuary of a newly organized or reorganized Sanitary Enameled Ware Association. All the corporate defendants, except the Kerner Manufacturing Company, belonged to it. Four other makers of the ware were members of it. These four refused to enter into the price agreements. Consequently they did not take licenses from Wayman. One of his duties as commissioner of the association appears to have been to do what he could by argument and expostulation to prevent price cutting among its members. To this end he wrote many letters. In one of them he speaks of cuts from 2½ to 5 per cent below the published prices as the normal and usual thing. He takes them for granted. They are not cause for complaint. What worries him is the cuts of 20 per cent which he says were then being made. In March, 1910, the terms of the agreements executed two months later were being worked out by correspondence and conferences among the defendants. In that month Commissioner Wayman urged the members of the association to stop quoting what he called the "ridiculous" prices which had recently been made. The Standard Sanitary Manufacturing Company, whose published price lists defendants' counsel suppose show the actual market prices, appears to have had a regularly organized system [180] of rebates. When the agreements now in

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controversy went into effect, the Standard notified its customers that their special rebates would be withdrawn. They were told, however, that checks would be sent them for whatever rebates were then due. The correspondence between the Standard and another of its customers shows that he had been buying at the "supposed" car load limit price less a confidential $7\frac{1}{2}$ per cent discount. Whether the "supposed" car load limit price was the published price or a generally understood discount below it does not appear.

The record contains many letters written by jobbers to some one or the other of the corporate defendants asking that orders alleged to have been sent in before June 4, 1910, should be filled at the old prices. Sometimes their requests were granted. They were grateful. Sometimes they were told that their order had not come to hand before June 4. If filled, it must be at the new prices. A long correspondence usually followed. The jobber tried hard to get the ware at the old price. Many letters passed between one Sullwold and the defendant Ahrens. Ahrens is president of the Standard. Sullwold is head of a Minneapolis jobbing house. He did not like the new scheme. Ahrens tried to get him to come into it. They wrote each other at great length. They go into many details. Whenever one thinks he can make a point on the other, he does so. Sullwold repeatedly says that the ware will cost the jobbers more. Ahrens does not deny. Both take it for granted. Wayman testifies that to stop "ruinous competition" was one of the purposes of the agreements.

The J. M. Kohler Sons Company of Sheboygan, Wis., was a member of the Sanitary Enameled Ware Association. Wayman and a number of the defendants worked hard to get it to take a license. It would not. It claimed that the scheme was a price agreement, pure and simple. It said that price agreements were forbidden by the laws of the United States and of Wisconsin. One Kroos is connected with it. He was a witness for the government. He presented some elaborate calculations as to the difference between the prices his company had been getting for the ware and the prices it would have received under the Wayman plan. As he figured it, the latter were in every instance greater. The difference ranged from 1 to 45 per cent. Defendants' counsel

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say that he did not know what he was talking about. According to them, he did not understand how the price tables of the defendants were to be applied. He, however, gave the prices of his own company for the various articles principally dealt in by it and the defendants. It would have been easy for the latter to show what the true comparison was, if it had seemed to them expedient so to do. It is, however, not important to determine whether Kroos did or did not fall into error. There is in the record a letter to the Standard Sanitary Manufacturing Company from one of its customers. It was written shortly after the price agreements went into effect. In it the writer remarks that, of course, the Standard understood that he could not do much with their prices so long as Kohler continued to sell at the prices it was then making. Quite clearly the new prices were materially higher than Kohler's. The record shows that the agreements [181] were intended to raise prices, and that they did so. How great the increase was is not shown either in percentages or in dollars and cents. To have figured it out would have taken much time and money. Very likely no one knows how much prices were raised. Each defendant knows how much more it took in under the agreements than it had obtained before. No one of them had any accurate knowledge as to the gain made by any one of its fifteen corporate co-defendants. Not every one of them would have found it easy to tell what the precise percentage of increase in the price received by it for each kind of article had been. Before the agreements went into effect, there was no fixed price. In every large transaction and in many that were not large the price actually paid was the outcome of a special and usually of a secret bargain.

Not only did the agreements raise prices—they prevented reductions that would otherwise have been made. The market conditions in the winter and spring of 1910 were such that prices left to themselves would have gone still lower. How rapidly the drop would have run into money is shown by a statement of the president of the Standard. He was trying to get the Kohler Company to take a license. He pointed out how good a thing the scheme was from the manufacturer's standpoint. He said, if it did not go through,

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it would cost the Standard's stockholders \$300,000 in 1910, for in that event he would have to reduce prices. The defendants say that prices may be too low for the public good. Competition may be carried far enough to hurt everybody concerned. It may in the end be the direct cause of monopoly. Under its stress all but the strongest producers may go to the wall. The government replies that, if all the makers of an article of common use combine to raise and maintain prices and to punish any one of their number who reduces them, all the evils which to common experience of mankind result from monopolies will surely follow. Possibly both the defendants and the government speak truly. It may be that one of the great problems of the day is to find some way of protecting the general public against monopolistic combinations without compelling business men to subject themselves and their capital to all the perils of unrestrained competition. To find its solution would appear to be the business of the statesman. The defendants say the courts may give it. In their opinion makers and dealers may combine to raise prices without violating the Sherman Act, provided that the prices fixed by their agreement are not unreasonably high.

In each particular case upon the evidence submitted the courts must say whether the prices asked are or are not reasonable. It would not be an easy task. Some standard of reasonableness would have to be worked out. The factors to be taken into account would be numerous and complex. The labor and expense of finding out what all the relevant facts were would be enormous. After all was done and said, the margin of doubt would usually remain large. If the dealers were bound to show affirmatively that their prices were reasonable, the government would usually win. If the government had to show that they were unreasonably high, it would ordinarily lose. In this case the defendants assume that the burden of proof as to the unreasonableness [182] of their prices is on the government. They say, and say truly, that the government has neither shown nor attempted to show that the schedule prices were unreasonable. The government replies every agreement to fix prices and to force or

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bribe makers or dealers to maintain them is illegal. In its view there are no circumstances in this case which take it out of the general rule. The presumption of law is that the prices which have been made by the free and untrammelled trafficking of the market place are the reasonable prices. Any one who interferes with the natural action and interaction of this bargaining assumes the burden of showing that what he did was fair and reasonable. If such a burden rests on the defendants, it has not been sustained. They had not shown what capital they have invested in the business. They have not told what net profit, if any, they earned under the old prices.

These opposing contentions raise questions of great moment and of exceeding difficulty. To answer them wisely may require going to the very roots of our conceptions of what the relation of the state to the industrial life of its people should be. Every one has the right to discuss them. It may be a duty to do so at all reasonable times and in all proper places. This opinion is not a proper place for such a discussion. Some men believe that price agreements should be sustained by the courts, unless they are shown to be against the public interest. Others hold that they may be permitted only when it is affirmatively shown that they promote the public interest. Still others say that a price agreement pure and simple is always illegal. That the Supreme Court has declared the last of the above-stated contentions to be the law is conclusive here. Only a few months ago it said:

"Agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 408, 31 Sup. Ct. 884, 55 L. Ed. 519.

[2] At the moment we are considering only one question, Would the agreements have violated the Sherman Act had the dredger patents had no part in them? They destroyed competition. They fixed prices. For that purpose they were made. They had no other. Defendants say that to fix prices and to destroy competition would have been to their profit and to the public good. They may not break the law because

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they think that it will be well to do so. In view of the character of the parties, the necessary effect of the agreements was clearly to restrain trade within the purview of the statute. In such case they cannot be taken out of the category of the unlawful by general reasoning as to their expediency or non-expediency or the wisdom or want of wisdom of the statute which prohibited their being made. When the nature and character of the contracts create a conclusive presumption bringing them within the statute, such a result is not to be disregarded by the courts by a substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it is. *Standard Oil Co. v. United States*, 221 U. S. 65, 31 Sup. Ct. 502, 55 L. Ed. 619.

[183] It follows from what has been said that, unless protected by the terms or the policy of the patent laws, the agreements violate the Sherman Act.

[3] 2. Did the part played by the patents make lawful what was otherwise forbidden? The ware is made of cast iron. After it has been shaped, it is enameled. Enameling involves two distinct processes. In each there are several steps. The ware is first given what is called the "slush" coat. This is enamel applied in liquid form. It is burnt on the base by the application of intense heat. The article is placed in a furnace. It is raised to a red heat, say 1,500 degrees Fahrenheit or upwards. It is taken from the furnace. While it still glows, powdered enamel is sprinkled upon it. It is put back in the furnace. It is again heated. When it is taken out, it usually is again sprinkled with the powder. If so, it is again reheated to fuse the enamel upon its surface. This process may be repeated indefinitely. Ordinarily two coats of the powder suffice. When the last has been burnt on, the ware is allowed to cool. It is ready for finishing, inspection, cleaning, shipment, and sale.

The patents spoken of in this case are for automatic dredgers. A dredger is used to sprinkle the powdered enamel on the ware. It serves no other purpose. It is not used in making the iron, or the ware out of the iron, or the liquid, or the powdered enamel, nor in the construction, the heating, or

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operation of the furnace, nor in taking the weighty and red-hot metal out of the furnace and putting it back. In the doing of these things many compositions of matter, machines, tools, appliances, and processes are employed. Upon the well doing of every one of them the usefulness, the attractiveness, and the durability of the ware depend. Whether any one of them shall be well or ill, cheaply or expensively done, turns in greater or less degree upon the fitness and adaptability of the compositions, machines, tools, appliances, and processes used. Any patentable improvement in any one of them would bear the same relation to the ware as is borne by the automatic dredgers. There might be differences of degree in either direction. In legal theory no distinction would be possible. From this point of view further inquiry into the precise degree of usefulness of the automatic dredger in the sprinkling step of the enameling process of making the ware might be omitted.

The question of law will be, in any event, whether the owner of a patent on one of many tools used in the making of a particular kind of unpatented ware may lawfully make such agreements with reference to it as those in the record. This case is, however, one of importance. In certain respects it is suggested that it is one of the first impressions. It will be well, therefore, to understand how the enameler would like to sprinkle the powder, and to what extent and in what way the automatic dredger helps him to do it as he would. He wants to use little powder. It is more or less costly. The thinner the enamel coat, the better the ware looks and lasts. The whole surface of the article must be covered; otherwise it will be almost or altogether useless. The more uniform the coat of enamel is, the more sightly and durable it will be. If little powder is to fully cover the [184] entire surface, it must be applied in a finely divided form. Every portion of the surface must receive as nearly as may be precisely the same amount of powder as any other portion of like extent. The sprinkling must therefore be done with great evenness and regularity. It must be done quickly. The powder will not attach itself firmly to the base, unless fused upon it. If every minute portion of the surface is to

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be covered, the powder must melt and run in liquid form the moment it touches the article. The sprinkling must consequently be done and finished while the iron remains hot enough to liquify the enamel the instant the latter touches the former. For this purpose a minimum temperature of 1,200 degrees Fahrenheit is required. It is true that, if time does not suffice to sprinkle the powder over the entire surface, the article may be returned to the furnace and reheated. When taken out again, the uncovered portion may be sprinkled. A coat applied in installments does not usually look well to an expert eye. It is costly. So to put it on takes more time and more fuel. The manufacturer likes the processes used in his factory to be of a kind easy for the workman to learn and to practice. Labor then costs less both in money and worry.

When makers of enameled ware first wanted to sprinkle powder on iron, they set about doing it in the way in which men had for countless centuries been wont to sprinkle powder for other purposes. They took an ordinary sieve, dredge, or sifter. It was not unlike in size and shape that with which housewives had for time out of mind sifted flour or meal. The enameler, it was true, could not handle his sifter as his wife handled hers. He could not stand beside the surface he was to cover, and with both hands shake the dredge over it. He could not because that surface was part of a mass of red-hot iron. He must stand back from it. Accordingly a handle was put on the dredger. He could not shake it as his wife shook hers. Her only object was to reduce the meal to a fine powder. It made no difference whether more of it fell upon one portion of her board or pan than on another. He must sprinkle his powder uniformly. He could not force it through the meshes by moving the whole dredger and its contents more or less briskly back and fro. He must move it regularly and in one direction. It was not desirable to let it come back on its own tracks. The enameler shook his sieve by tapping upon the handle with a piece of iron. This tapping occupied one of his hands. He had to support and guide the dredger with the other. He had a disagreeable choice to make. If he used a dredge with a short handle, he

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had to stand very near large articles of glowing iron. If he lengthened the handle, the weight of the dredger and its contents, at the end of so long a lever became too great for his strength. What he in fact at first did was to use a dredger with a handle three or four feet long. This brought him very close to the red-hot metal. To partially protect himself from the heat he wore asbestos masks, gauntlets, and breast-plates. Even so he had an uncomfortable job. The heat was always disagreeable. At times it must have been trying. Supporting the dredger with six to eight pounds of powder in it, and moving it steadily, firmly, and accurately over the surface, was hard work. [185] Continuously tapping with the other hand was racking to the muscles and nerves, although the force required to give a single tap was doubtless trifling. Not every man was physically able to handle a dredger under such conditions. Few men could have handled it for more than a few minutes at a time. They did not have to. Bath-tubs are the largest articles usually made. Defendants' witnesses say that, when the short handled dredger was used, it took on an average about four minutes to cover a bath-tub with the powder. The same witnesses tell us that an expert enameLER could enamel some 11 tubs in a working day of ten hours. Each tub ordinarily was given two coats of the powdered enamel. An enameLER, therefore, in ten hours went twice over each of 11 tubs; that is, he sprinkled 22 coats in all. It took him 22 times four minutes to do it, or eighty-eight minutes in the aggregate. In the ordinary course of his work he handled the dredger for four minutes. He did something else for 23, then took another four-minute turn with the dredger, and so on throughout the day. It may be that defendants' witnesses have underestimated the number of tubs formerly enameled by a good workman in a single day. Even so, the enameLER used the dredger for short intervals only. There were relatively long intermissions when he did not. If it had been otherwise, the incidents related as to the exhaustion and almost collapse of the workmen could have been common and typical, instead of being occasional and altogether exceptional, as they doubtless were. Had they been ordinary occurrences, the industry could scarcely have been carried on.

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Whether they were or were not frequent is now immaterial. Before the first automatic dredger was invented, it had ceased to be necessary for the enameler to stand close to the glowing metal or to support the weight of the dredger and its contents. It had occurred to some one that the handle might be supported from the ceiling. It could easily be balanced by a counterweight. The length of the handle was no longer limited by the physical strength of the workman. It was made 7 or 8 feet long. The asbestos armor was discarded, except upon the arm and hand most exposed. The enameler had no great weight to support. One arm could be devoted solely to guiding the dredger. The other was still necessarily occupied in keeping up a continuous tapping. This form of dredger had come generally, if not universally, into use before the invention of the pneumatic dredger some twelve or thirteen years ago. In essence the patented dredgers differ from the unpatented in one respect only. In the former the tapping is done by machinery. In their predecessors it was done by hand. The handle of the patented dredger is made of hollow metal. In it a plunger is fitted. By compressed air or by electricity the plunger is made to keep up a continuous and perfectly steady and uniform tapping. The workman by the pressure of his thumb may at his will increase or decrease the frequency of these tapplings, or he may stop them altogether. The automatic dredgers were supported in the same way as the unpatented long-handled dredger had been. The enameler who works with one can use both hands to guide the dredger. He has nothing else to do. His work is much simplified, and made far easier and more agreeable. The use of both [186] hands gives him a better and a surer control over the motion of the dredger. There is less danger of his putting too much powder in one place and too little in another. Personally he is much more comfortable. He can work faster. At the same time he no longer feels rushed or driven. He knows now that he can put one coat on before the metal cools. Before he was not always, perhaps not usually, sure that he could. As a rule his work is now better done.

The patented dredger was useful in other ways. It could be fitted with a finer mesh. It puts the powder on the metal

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in a more finely divided form. This, as has been already pointed out, is an advantage. So long as the tapping was done by hand, the blows upon the handle would not always be hard enough to force the powder through a mesh as fine as that which may now be used. The powder falls from an automatically tapped dredge with a regularity and uniformity greater than that which can be given to it by the average workman. The use of the patented dredgers may or may not save enameling powder. There is testimony both ways. With such dredgers more work can be done in the same time. Other things being equal, it is probable that ware, in the enameling of which they have been used, will on the average be somewhat better enameled than it would have been had hand dredgers been employed.

The record does not enable us to tell in either absolute or relative figures or percentages how great is the saving of time or the bettering of quality. The same number of men in the same time now usually turn out more work than they formerly did. In the attainment of this end the patented dredger helps. Other things contribute. Some, but not all, of these other improvements can be used to greater advantage in connection with the automatic than with the hand dredges. How much the use of the patented dredges improves the quality is still harder to figure out. Some men with fine tools cannot do as good work as other men with poor. The defendants' evidence seems to show that the percentage of ware of high quality turned out depends much more largely upon shop management and efficiency than it does upon the use of one form of dredger rather than another. One of the defendants' witnesses says that with the hand dredge his shop made 95 per cent of second and only 5 per cent of first class goods. With the automatic dredger he gets 25 per cent of seconds and 75 per cent of firsts. This is definite enough. Another witness for the same side, but whose experience has been had in another factory, says that with the old hand dredge he made only 5 per cent of seconds. By the use of the automatic dredger he has brought that proportion down to 1 per cent. If each of these witnesses is even approximately accurate, it follows that one of them with an automatic dredger made five times as large a

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proportion of inferior goods as did the other when using a hand dredger.

All that can be safely said is that the automatic dredgers are useful tools. By their use, all other things being equal, ware can be made more cheaply and on the whole of a somewhat better average quality. No one claims that he can tell by inspection of a completed article whether the enameling powder was sprinkled upon it with a hand or [187] an automatic dredger. Some of the witnesses think that, if they were shown two considerable lots of the ware in the enameling of one of which one kind of dredger had been exclusively used and in that of the other another kind, they could say upon which the powder had been shaken from a hand dredger, and upon which from an automatic dredger. It does not appear that the experiment ever has been tried. It is quite probable, nevertheless, that the distinction could frequently be made with reasonable accuracy, provided that the two lots had both been made in the same shop by the same men and under otherwise like conditions, except as to the dredger used. The difference of results attained in different shops as shown by the record, and the further fact that, as soon as the operation of the price restrictions was suspended, some of the defendants, although using the automatic dredger exclusively, put large quantities of seconds on the market, seem to show that it is unlikely that any one could tell upon which of two lots of the ware made in different shops or in the same shop under different conditions the hand dredger had been used and upon which the automatic.

It follows that there is no respect in which every tub in the enameling of which an automatic dredger has been used differs from every tub in the enameling of which the hand dredger has been employed. Whether the ware shall be well or ill made, whether it shall be durable or the reverse, whether it shall be sightly or unsightly, depends upon many circumstances of which the kind of dredger used to sprinkle the powder is only one, and probably not the most important. Much turns on the composition of the enamel. Each factory makes it according to its own formula, which it tries to keep secret. Perhaps none of the powders in use give complete satisfaction. Experiments for their bettering are con-

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tinually being made. How controlling a part the composition of the powder plays is shown by the account given by one of defendants' witnesses of the disastrous results upon the ware of an experimental change in the powder made since the first of the present year by one factory. The liquid enamel or slush coat must be properly made and fittingly applied. The furnaces must be adapted to the work to be done by them. The appliances for putting the ware into the furnace and for taking it out again must be constructed, so that with little consumption of time and labor the work will be done without damaging the delicate enamel not yet firmly fused upon its base. The castings must be well made and of the right kind of metal. It is quite possible that a new tool, appliance, or process may be invented for the better doing of any one of them. Its use may improve the average quality or cheapen the average cost of the ware, or both. Every such an inventor, if he obtained a patent for his invention, would be as much entitled as Wayman to say at what price and upon what terms men might deal in the finished article in some stage of the making of which his invention had been used.

Defendants say that while it is true that the automatic dredger is a mere tool, used in only one operation of a number required for the making of the ware, and while it is conceded that merchantable ware can be made without its use, still the advantages of using it are so [188] great that as a commercial proposition the ware cannot be made without it. It is unnecessary to consider what legal consequences, if any, would follow if the record sustained this claim. It does not. It is true certain witnesses say that in their judgment the automatic dredgers have become necessities for the manufacture of the ware for commercial purposes. The record conclusively demonstrates that they are mistaken. Such concerns as the J. M. Kohler Sons Company and the Iron City Sanitary Manufacturing Company have no rights under any of the patents. There is no evidence of their having infringed them. They make and sell the ware in large quantities in competition with the licensed manufacturers. Moreover, if the experience of the concerns which had the right

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to use the patented dredger had convinced them that the ware could not without their use be made good enough and cheap enough to be sold in competition with them, it is not conceivable that they should have gone to all the trouble they did to induce those two concerns to take licenses. According to the defendants' present theory, the refusal to do so was tantamount to commercial suicide. If factories without licenses could not make ware which could be sold in competition with that made by those who had licenses, the fewer who had licenses the better for those who had.

The ware is absolutely unpatented. Any one may sell it as freely as he may a loaf of bread. No one can tell by looking at a bath-tub whether enameled powder has been sprinkled upon it by a patent dredger any more than any one who eats a loaf of bread can tell whether it has been baked in an oven with a patented grate, or who lights a kerosene lamp can tell whether in the process of refining a patented tool has been used, or by taking a pinch of snuff can be sure that there was or not a patented mill used in grinding the tobacco.

If agreements in this case are not violations of the Sherman Act, similar agreements among all the bakers of bread, the refiners of petroleum, the grinders of snuff will be legal, provided that somewhere in the process of making the bread, refining the petroleum, or grinding the snuff a patented tool has been used. The issue is important. It cuts deep. The record squarely presents it. It must be passed upon. The defendants say they have broken no law, even if all that has thus far been said herein be true. They rely upon what they understand to have been decided by the Circuit Court of Appeals of the Seventh Circuit in the case of *Rubber Tire Wheel Co. v. Milwaukee R. W. Co.*, 154 Fed. 358, 83 C. C. A. 336. There the court said that no one can use a patented article without the consent of the patentee. He may fix his own conditions. It adds:

"Whatever the terms the courts will enforce them provided only that the licensee is not thereby required to violate some law outside of the patent laws, like the doing of murder or arson."

The defendants ask: "Is not the legal title to the dredger patents in Wayman?" "May any use the automatic dredgers without his consent?" "May he not make what terms he

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will for his license to use them?" "Will not the courts enforce those terms, provided they do not call for the violation of some law outside the patent law, like murder or arson?" "Have the defendants committed murder or arson [189] or anything like either?" Making a price agreement differs widely in many fundamental respects from either murder or arson. The difference is so profound that it can be easier felt than accurately defined. It is not to be found in the circumstance that almost all races of men have for countless centuries felt that murder and arson were highly immoral acts. It would not be difficult from the text of the criminal codes of many different peoples at widely separated periods of the world's history, and from the writings and sayings of ethical and religious teachers of divers creeds and races, to argue that for some thousands of years the vast majority of mankind has felt that it was also immoral to make a combination for the purpose of raising the prices of things of general use. At all times there has been a minority of shrewd and able men who have believed that such combinations were merely the reasonable exercise of superior sagacity and foresight. There never has been a time when most men, however much they disliked price agreements in things they bought, but did not sell, were not able to persuade themselves that there was nothing wrong in agreeing to keep up the prices of things they sold, but did not buy. It is not for us to say what the true ethical relation of the monopolist to the community in which he lives is. In this country those who believe that he is a dangerous wrong-doer have in lawful manner written their convictions upon the statute book. The Sherman Act forbids restraint of interstate trade and attempts to monopolize it. He who does either may be punished, and that, too, in a way which the Legislature seldom directs, unless the thing forbidden is felt by the majority of the people to be unethical if not highly immoral. The use by the Circuit Court of Appeals of the Seventh Circuit of murder and arson as illustrations of breaches of law which a patentee had no greater immunity to commit than had any other man was accurate, natural, and striking. At a glance, every one could see that a patentee could not lawfully require his licensee to commit either. Unfortunately

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some people have persuaded themselves that those illustrations were intended as limiting the violations of law which a patentee could not require to crimes which the ordinary man feels to be of the same general type as murder and arson. Such, of course, was not the intention of the court.

A patentee may not require his licensee to sell a patented oil which flashes below the minimum temperature prescribed by state law. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115. He may not authorize his licensee to prescribe and sell his patented medicine in a state which requires of all who write prescriptions that they shall have qualifications not possessed by the licensee. *Jordan v. Overseers of Dayton*, 4 Ohio, 295. Selling oil with a low flashing point or prescribing patent medicine without having a state license to practice medicine would no more strike the average man as akin to murder or arson than would a combination to fix prices. In one respect they are like murder and arson. They are violations of law outside the patent laws. So is a combination in restraint of trade. What the court meant was what the court said—a patentee cannot require his licensee to violate a law outside of the patent law. Murder and arson are out-[190]side the patent law. Every obligation which a patentee attempts to impose upon his licensee to break any law outside of the patent law is in that respect like a requirement to commit murder or arson. In the nature of things such must be the law. A patentee is as much subject to the laws of the land as is any other man. From one special application of one class of laws he is exempt. At common law and by statute monopolies are unlawful. At common law and by statute a man who invented a new and useful thing might be given a right which would enable him for a limited time effectually to monopolize it. The courts have said that this right to monopolize what he invented cannot be taken from a patentee by state laws. They say it has not been taken away by Congress. All men know that Congress never intended when it passed the Sherman Act to change the patent law. It did not do so.

[4] The patentee may, in spite of that law, monopolize for the term of his patent the thing which he or his assigner

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invented. Neither at common law nor in this country by statute has he ever had a right to monopolize anything else. As to everything not validly claimed in his patent he is as other men. If by the common law or the statutes of the state or by the enactments of Congress men are forbidden to restrain trade or to monopolize it, a patentee may not restrain trade or attempt to monopolize it in anything except that which is covered by his patent.

[8] A patent is a grant of a right to exclude all others from making, using, or selling the invention covered by it. It does not give a right to the patentee to sell indulgences to violate the law of the land, be it the Sherman Act or another. The right to exclude others is the property of the patentee. It is his very own. He may do with it as he will. A very rich man may have \$100,000,000 of cash. It is his property. It is his very own. He may do with it as he will. Neither one of them can use his property to bring about a violation of law. A patentee who monopolizes his invention breaks no law. He who uses his property right to exclude others from the making, selling, or using his invention, for the purpose and with the effect of making a combination to restrain trade in something from which his patent gives him no right to exclude others, does break the law. He breaks it precisely as the individual defendants in the Standard Oil and American Tobacco Companies broke it. They had the same right to use their brains, their capital, and their credit as they thought best, as he had to use his right to exclude all others from making, using, or selling automatic dredgers. He was subject to the same limitations as they were. They could not lawfully use their brains, their money, and their credit to restrain trade in petroleum and tobacco. He cannot use his patent rights to restrain trade in unpatented bath tubs.

The defendants have pressed upon our attention many cases in the Circuit Courts and in the Circuit Courts of Appeal. Many of them have upheld the right of a patentee to fix the price below which a purchaser from him of patented articles may not sell those articles. In some of these cases it has been held that one who sells at a lower price thereby becomes

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an infringer, and that the federal courts have [191] jurisdiction of a suit brought against him on account of such sale, irrespective of the amount in controversy or the citizenship of the parties. *Edison Phonograph Co. v. Kaufmann* (C. C.) 105 Fed. 960; *Edison Phonograph Co. v. Pike* (C. C.) 116 Fed. 863; *Victor Talking Machine Co. v. The Fair*, 123 Fed. 424, 61 C. C. A. 58; *National Phonograph Co. v. Schlegel*, 128 Fed. 733, 64 C. C. A. 594; *New Jersey Patent Co. v. Schaefer* (C. C.) 144 Fed. 437; *Id.* (C. C.) 159 Fed. 171; *Rubber Tire Wheel Co. v. Milwaukee R. Co.*, 154 Fed. 358, 83 C. C. A. 336; *Goshen Rubber Works v. Single Tube A. & H. Tire Co.*, 166 Fed. 431, 92 C. C. A. 183. The Supreme Court has in several recent cases expressly said that it was not to be understood as expressing any opinion as to whether such restrictions when applied to patented articles were or were not valid. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086. Wayman did not sell patented dredgers on condition that the purchasers should not resell them below a fixed price. The question of whether such restrictions upon the sale of patented articles are valid is not before us. We neither decide it nor intimate any opinion upon it.

In a number of cases the owner of a machine patent has licensed others to use the machine on condition that they would buy certain unpatented things upon which the machine operated exclusively from the patentee. Those conditions have been held valid by a number of courts. Persons who with knowledge of the terms of the license have sold to the licensee some of the unpatented things to be used on the patented machine have been held liable for contributory infringement. *Heaton Peninsular Button Fastening Co. v. Eureka Specialty Co.*, 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; *Rupp, Wittgenfeld Co. v. Elliott*, 131 Fed. 730, 65 C. C. A. 544; *A. B. Dick Co. v. Henry* (C. C.) 149 Fed. 424; *Eolian Co. v. Harry H. Juelg Co.*, 155 Fed. 119, 86 C. C. A. 205; *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.* (C. C.) 172 Fed. 225; *Crown Cork & Seal Co. v. Standard Brewery* (C. C.) 174 Fed. 252. In the case of *Cortelyou*

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v. Johnson, 145 Fed. 933, the majority of the Circuit Court of Appeals for the Second Circuit declined to hold that a third person who with knowledge of the restriction sold to a licensee ordinary articles of commerce to be used upon the licensed machine was a contributory infringer. All the judges held that in the particular case there was not sufficient evidence that the defendant made the sale with knowledge as to the terms of the license, and the use to be made of the ink. The Supreme Court affirmed the decision below on the ground of want of sufficient evidence of notice. It expressly refused to express any opinion as to whether the defendant could have been held had notice been shown. *Cortelyou v. Johnson*, 207 U. S. 196, 28 Sup. Ct. 105, 52 L. Ed. 167. A patentee may or may not be entitled to obtain his pay for his patented machine in whole or in part by stipulating that he shall have the sole right to furnish material to be used with it. We express no opinion upon the question. It would have been presented in this case had Wayman bargained with the corporate [192] defendants that they should buy all their enameling powder from him. Such a bargain would have been a very different one from that now before us. The purposes aimed at by such a bargain, the relations among the defendants, and between them and the public would have all been unlike those shown in the record.

What has been said is sufficient for the determination of this case. The ware is not patented. The agreements or licenses attempt to fix the price of unpatented ware and to monopolize the trade in it. The fact that Wayman had a patent on something else, even though it was a tool used in one step of the making of the ware, gives neither him nor his licensees the right to restrain interstate trade in the ware. The ownership of a patent for a tool by which old, well-known, and unpatented articles of general use can be more cheaply made gives no right to combine the makers and dealers in the unpatented articles in an agreement to make the public pay more for it. The first and second sections of the Sherman Act, "when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law without re-

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gard to the garb in which such acts were clothed. * * * In view of the general language of the statute and of the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute." *United States v. American Tobacco Co.*, 221 U. S. 181, 31 Sup. Ct. 648, 55 L. Ed. 694. In what has been said it has been assumed that Wayman was the real and substantial owner of the patents. That scheme was his. That his purpose was merely to make money for himself by selling to the corporate defendants indulgences to sin against the Sherman Act.

The government contends that this was not the real situation. In its view there is nothing before the court except an ordinary combination to raise and maintain wholesale and retail prices and to force all the makers and dealers in the country into it. Wayman, it says, was nothing more than the ordinary promoter. The patents served the purpose of the certificate of incorporation from New Jersey or Delaware used when the combination became a consolidation. We have not discussed this branch of the case. We will not. We refrain from doing so not because it would not be pertinent. It would. Ordinarily it would receive full consideration. Unusual circumstances shown by the record make it inexpedient and even improper to do so, if the case can be disposed of without commenting upon that aspect of it.

[5] Some months after these proceedings were begun the grand jury of the United States for the Eastern District of Michigan returned indictments against many of the defendants. They were charged with violating the Sherman Law. The acts alleged against them there are the same which are made the ground of the equitable relief here asked for. The defendants have moved that further proceedings herein be put off until the criminal case has been finally disposed of, and that the taking of testimony be then re-opened. It is urged that the individual defendants should in justice to themselves [193] testify fully and freely. It is said that this they dare not now do. They fear that something to which

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they swear in the civil proceeding may be used in the criminal to their hurt. This motion we cannot grant. The Sherman Act provides for both civil and criminal proceedings. The Attorney General must decide whether and when either or both shall be brought. To postpone finding an indictment until after a petition for an injunction had upon final hearing been granted or dismissed would be frequently, if not usually, to wait until after the period of limitations had expired. To refuse to decide the equity cause so long as the criminal charge had not been finally disposed of might leave the public to suffer for years from what the Attorney General believed to be a harmful interference with its rights and interests. The courts cannot, unless in exceptional cases, say that either must wait upon the other. A court of equity has a wide discretion. There may be circumstances which would justify its refusal finally to act until after the indictments had been tried. In our view such circumstances are not found here. The fact that many of the defendants are now under indictment makes it our duty to be careful not to say anything which might be used either to their prejudice or to that of the government in the impending criminal trial. Some minor questions affecting particular defendants are to be passed upon.

[6] The Colwell Lead Company says it is not engaged in interstate commerce. In our view it is. It makes its ware in New Jersey. It sends it to ware-rooms in New York City and in Worcester, Mass., and there sells it. Its trade extends over several states. It alleges that it had no part in any of the negotiations leading up to the formation of the scheme, that it did not execute a license agreement until some three weeks after the other corporate defendants, and that, then, it refused to bind itself to charge the resale prices. It was consulted through its president some time before any of the agreements were actually entered into or before their precise terms were definitely settled. He then gave a general approval of the plan. Neither he nor it appear to have done anything further until after the others had signed up.

Some months before the Standard Sanitary Manufacturing Company, which until May 4, 1910, owned the basic

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automatic patent, had given the Colwell Company a revocable license to use the dredger. The latter wanted Wayman to renew the license. It apparently did not want it badly enough to be willing to bind itself to charge the uniform resale prices of the New York City plumbers to whom it sold a large part of the ware. Wayman finally agreed in writing that, if it would take a license, he would try to get from the commission of the corporate defendants leave to cut these prices whenever it found that maintaining them would seriously handicap it. If the commission would not let the Colwall Lead Company do so, the latter on 10 days' notice could terminate the agreement. It would appear that it became a party to the combination to an extent sufficient to entitle the government to injunctive relief against it.

[194] [7] The evidence shows that two of the individual defendants, namely, Bert O. Tilden and George W. Franzheim, secretaries of the Colwell Lead and the Wheeling Enameled Iron Companies, respectively, had no part in forming the combination. They did not do anything in connection with it, except to attest in their official characters papers executed by their corporations. As to them the petition should be dismissed. Against the other defendants, corporate and individual the government is entitled to injunctive relief substantially as prayed for. In view of the pendency of the criminal case, all characterization of what the defendants have done not necessary to the effectiveness of the decree should be omitted from it. The government may submit a draft of a decree to the counsel for the defendants. If an agreement cannot be speedily had, we will upon application fix an early day for its settlement.

Goff, Circuit Judge (dissenting).

I cannot assent to the conclusion reached by the court in this opinion. The facts established by the testimony, considered in the light of the law applicable thereto, compel me to conclude that the allegations of the petition have not been sustained.

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STEERS ET AL. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1911.)

[192 Fed. Rep., 1.]

GRAND JURY (§ 10)—SELECTION OF JURORS—FEDERAL COURTS.—In drawing a special grand jury in a Federal Circuit Court in Kentucky, the clerk, for the purpose of distributing the jurors as evenly as possible between the several counties from which they were drawn, followed the method of rejecting the names of all jurors drawn who resided in a particular county after the desired number from such county had been drawn, continuing the drawing until the desired number had been drawn from each county. By Rev. St. §§ 802, 805 (U. S. Comp. St. 1901, pp. 625, 628), it is provided that jurors shall be returned from such parts of the district as the court shall direct so as to be most favorable to an impartial trial, and that special juries when ordered shall be returned in the same manner and form as is required by the laws of the State. Ky. St. § 2243 (Russell's St. § 3086), provides for the drawing of juries in the State court by the judge. *Held*, that the mode pursued by the clerk was, at most, irregular, and not prejudicial, and not such a plain error as would be noticed by the Circuit Court of Appeals in the absence of an assignment of error thereon.*

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 27; Dec. Dig. § 10.]

COMMERCE (§ 33)—WHAT CONSTITUTES "INTERSTATE COMMERCE."—A single shipment of a commodity, as tobacco, from one State into another to be marketed, constitutes interstate trade and commerce, within the meaning of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 8200).

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 33.]

For other definitions, see Words and Phrases, vol. 4, pp. 3724-3731.]

MONOPOLIES (§ 12)—FEDERAL ANTI-TRUST ACT—ILLEGAL RESTRAINT OF INTERSTATE TRADE.—A direct and absolute restraint upon interstate trade and commerce bearing no reasonable relation to lawful means of accomplishing lawful ends is not relieved from criminal illegality under the Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 8200), because the volume of traffic affected was small.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 12.]

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[2] **MONOPOLIES (§ 31)—FEDERAL ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF TRADE—INDICTMENT.**—An indictment for conspiracy to restrain interstate commerce in violation of Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), considered, and *held* sufficient.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 31.]

CRIMINAL LAW (§ 1043)—TRIAL—OBJECTION TO ADMISSION OF EVIDENCE.—A general objection to the admission of evidence for which no ground is stated will not support an assignment of error in a Federal court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654-2655; Dec. Dig. § 1043.]

CRIMINAL LAW (§§ 673, 1038)—TRIAL—EVIDENCE.—In a trial of a number of defendants for conspiracy, where items of evidence are necessarily admitted which at the time are competent against one defendant only, it is proper for the court to caution the jury as the trial proceeds as to the effect of such evidence, but its failure to do so, when not requested, is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §§ 673, 1038.]

CRIMINAL LAW (§§ 315, 423)—CRIMINAL PROSECUTION—TRIAL—EVIDENCE—STATEMENTS OF CONSPIRATOR.—A conspiracy proved to have been formed is presumed to have continued until its object was accomplished, and, on the trial of defendants charged with having conspired to prevent the shipment of certain tobacco in interstate commerce, statements made by one of defendants while the tobacco was being withheld from shipment, at their instance, were admissible against them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 748, 989-1001; Dec. Dig. §§ 315, 423.]

CRIMINAL LAW (§ 825)—TRIAL—INSTRUCTIONS.—Instructions in a prosecution for conspiracy, taken together, *held* not erroneous, in the absence of requests for more specific instructions on certain points.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.]

COURTS (§ 352)—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE—CRIMINAL CASES.—The Federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), providing for conforming the procedure in the Federal courts to that in the State courts in civil actions at law, does not cover instructing the jury.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 352.]

Conformity of practice in common-law actions to that of State court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

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CRIMINAL LAW (§ 1088)—TRIAL—INSTRUCTIONS.—Defendants in a criminal trial in a Federal court can not assign as error the failure of the court to instruct as to certain theories or inferences, which might find support in the evidence when they did not request such instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.]

MONOPOLIES (§ 31)—ANTI-TRUST ACT—PROSECUTION FOR CONSPIRACY—SUFFICIENCY OF EVIDENCE.—Evidence considered in a prosecution for conspiracy in restraint of interstate trade and commerce in violation of the Anti-Trust Act July 2 [§], 1890, c. 647, § 1, 28 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and held sufficient to require the submission of the case to the jury.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 31.]

In Error to the Circuit Court of the United States for the Eastern District of Kentucky.

Criminal prosecution by the United States against John S. Steers and others. Judgment of conviction, and defendants bring error. Affirmed.

In November, 1907, W. T. Osborne, living upon a farm near Dry Ridge, Ky., and his two tenants, Stowers and Bryant, had in their possession about four hogsheads of tobacco, being their entire crop for the season of 1906. They delivered these four hogsheads to Ramsey, the railroad station agent, at Dry Ridge, and directed shipment to Cincinnati, Ohio. Ramsey gave to Osborne a bill of lading in customary form, showing that he was the shipper, and that the "Globe House, Cincinnati, Ohio," was the consignee. This was Tuesday, November 26th. It was too late for shipment that day, and the next day there was no car available; so that on Thursday the tobacco was remaining in the railroad warehouse, awaiting transportation.

An existing association among the tobacco raisers of the vicinity, called the "Society of Equity" or the "Burley Society," had pooled and was holding at its warehouses all the tobacco of its members, until such holding, with other causes, should bring about a higher price, and it was opposed to the shipment to market of any tobacco not so pooled. Osborne and his tenants did not belong to the association, and their four hogsheads of tobacco were unpooled.

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During Tuesday and Wednesday, Osborne received messages to the effect that he must not ship this tobacco, and on the evening of Thursday a considerable number of men gathered in Dry Ridge with seeming reference to the matter of this shipment, and three of Osborne's acquaintances or neighbors went out to his farm to see him. They told him that there was a crowd of 50 men at Dry Ridge; that the crowd was determined this tobacco should not be shipped; and that, unless Osborne would withdraw the tobacco, it would be destroyed, and he or his property might be otherwise injured. He then determined that it might be withdrawn, and, to accomplish this result, he indorsed over the bill of lading to one of his visitors. The next morning, in seeming pursuance of some previously formed plan, a large body of men, probably 200 or 300, said to be more than had ever been seen together there before, assembled in Dry Ridge and marched to the railroad station. The indorsed bill of lading was presented, the tobacco was turned over by the station agent, and the procession, headed by four teams carrying the four hogsheads, marched away from the station, after the crowd had called the agent outside and notified him that he must not ship any unpooled tobacco. The four hogsheads were then returned to Osborne's premises and kept there by him until January 14, 1908. On this last day one of those who had been active in the proceeding notified Osborne that he was at liberty to ship the tobacco, and he did so at once.

A special grand jury considered these acts to be in violation of the congressional act, approved July 2, 1890, commonly called the "Sherman Anti-Trust Law," and returned an indictment against the appellants and four others. Motions to quash and demurrers were overruled, and the respondents tried upon their pleas of not guilty. The case was nolle prossed as to one respondent, the jury acquitted three, and the appellants, eight in number, were convicted and severally sentenced to pay considerable fines. They all join in this writ, and assign a large number of errors. While we have not omitted to consider each one argued, we must

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confine this opinion to the few which seem to us most deserving of discussion.

[4] *W. W. Dickerson (Clare, Dickerson & Clayton and Myers & Howard, on the brief)*, for plaintiffs in error.

E. P. Grosvenor, Sp. Asst. Atty. Gen. (*James A. Fowler*, Asst. Atty. Gen., and *Edwin P. Morrow*, U. S. Atty., on the brief), for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above).

[1] 1. Upon their motion to quash the indictment, respondents offered to show that, proceeding under an order for the drawing of a special grand jury, the clerk, acting as jury commissioner, drew names in the ordinary way from the box used for that purpose, when the court was sitting at London, and containing the names of jurors residing in the counties from which juries were customarily drawn for service at that point. However, he did not take, as jurors, the first 28 names drawn; but, following a plan to apportion the jury approximately evenly numerically between the various counties (as, for example, to procure five jurors from each of four counties and four from each of two counties), after the drawing had given him the predetermined number of names from one county, he rejected further names from that county, and continued the drawing until he had procured such number from each county. This method of selection is said not to be in compliance with sections 800, 802, 805, 915, R. S. (U. S. Comp. St. 1901, pp. 623, 625, 626, 684), and section 2243, Ky. St. (Russell's St. § 3066). No error was assigned upon this point, but it was pressed upon us on the argument.

We must presume regularity in all cases where the contrary is not expressly shown, and we think the proper inference from this record is that the counties, or the part of the

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district, to which the drawing was confined, had been designated by the order of the court referred to or were selected with the knowledge and approval of the judge. Whether we should also infer from this record that the apportionment which the clerk made among the several counties was pursuant to an order of the court or an established practice approved by the court, or whether we should infer that the clerk's action was without any sanction of the court, we think immaterial to the disposition of this case. In the former event, there would be no irregularity. In the latter case, it is enough to say that the method adopted by the clerk would have been the natural and reasonable method for the court to adopt, had it given instructions on the subject. It did not result in any grand jurors from an unauthorized district or any incompetent grand jurors; and, if irregular at all, the overruling of a motion to quash, based thereon, would not be such a plain error, as, under rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), we ought to notice in the absence of any assignment.

[2] 2. Demurrer. The first ground of demurrer was that one shipment by one shipper to another State does not amount to that interstate trade, the restraint of which is forbidden. This argument is [5] based upon the cases holding that a single transaction does not amount to trade or business under the rules governing levying a tax upon a business or engaging in business in a State; upon the holding in *Packet Co. v. Bay*, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428, that an insignificant interference with interstate commerce may, under this act, be disregarded; and upon the supposed holding in the recent *Standard Oil* and *Tobacco cases*, 221 U. S. 1, 106, 31 Sup. Ct. 502, 632, 55 L. Ed. 619, 663, to the effect that, in order to be covered by this statute, the restraint of trade must be of considerably quantity; that is, of unreasonable amount.

"Trade," as referring to a business which must have a fixed continuance and established character in order to be in existence so as to be subject to a tax or so as to be carried on within a State, can not be synonymous with "trade" in the sense of commerce or traffic or transportation from one place

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to another; and so decisions like *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 734, 5 Sup. Ct. 739, 28 L. Ed. 1137, are not relevant.

In the Packet Company case, the interference under consideration, aside from that dependent on the sale of the vendor's good will, was indirect, contingent, and uncertain. The court did not say that the amount of traffic was too insignificant to require action, but that this uncertain, remote, and contingent interference was insignificant. In the present case the interference was absolute and entire. All of the traffic or commerce involved was wholly stopped.

We do not find in the Standard Oil and Tobacco cases any holding that a direct restraint of trade must affect an unreasonably great amount of commerce in order to be within the prohibition. As we read these opinions, the matter under consideration, from the standpoint of reason, was not the amount of merchandise or traffic affected by the restriction, but the character and extent of the restriction itself; and it was thought that, if such restriction reasonably pertained to lawful results, it was not of itself necessarily forbidden. These opinions contain no justification for the idea that a direct and absolute restraint, bearing no reasonable relation to lawful means of accomplishing lawful ends, can be permitted only because the volume of traffic affected is not very great.

[3] It is true that the theory of injury to the public lies at the bottom of the statute, and that it is directed against things which tend "to deprive the public of the advantages which flow from free competition" (*Northern Securities case*, 193 U. S. 197, 332, 24 Sup. Ct. 436, 454 [48 L. Ed. 679]); but a single, private injury may well tend to this public result.

We cannot doubt that there may be a conspiracy under the act with reference to a single shipment only, and that, in so far as the rule of insignificance may exist, it does not apply to circumstances like these. This shipment was the entire crop of these three farmers for the year. It was, to them, of large relative value. It cannot be overlooked as

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unimportant; and its shipment to Ohio did constitute "interstate trade and commerce." It was clearly interstate transportation; and interstate transportation is interstate commerce. *U. S. v. [6] Freight Ass'n*, 166 U. S. 290, 312, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488.

[4] The next ground of demurrer was that the indictment did not show the facts constituting the conspiracy, but only alleged the conclusion. If this statement were accurate, the indictment would not be good; but we do not think such construction is justified by the indictment. This alleges that appellants "did conspire together and engage in a conspiracy among themselves in restraint of said interstate commerce so carried on by said Osborne and said railway company * * * by the several means now here set forth and described; that is to say." It then describes, as the "means" adopted, constituting the conspiracy, a plan to assemble a mob and by threats, intimidation and violence, compel Osborne to withdraw the shipment, or if he would not, then to compel the railroad agent to turn it over to the conspirators. The indictment then proceeded under the heading "overt acts," to describe the things which were done by defendants, being the same things which it had already recited as planned. It is said that the description of overt acts cannot be carried over into the accusatory portion of an indictment, nor make it good when that accusatory portion fails from the lack of stated facts, and this seems to be the applicable rule of pleading. *U. S. v. Britton*, 108 U. S. 199, 205, 2 Sup. Ct. 531, 27 L. Ed. 698. Here, however, the specific statement of the several means which were determined upon as a part of the plan should be treated as in the accusatory portion, and when so treated, the indictment is not open to the objection that it states conclusions only.

The next ground of demurrer is that the indictment did not sufficiently allege that the accused, at the time of their conspiracy, or while acting thereunder, knew that the tobacco was an article of interstate commerce. A conspiracy of this general character is a crime at common law, and

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presumably was in Kentucky, and we are not clear that it is necessary to allege scienter as to the specific fact which makes the crime cognizable in one court instead of in another; but, however that may be, we think the guilty knowledge is sufficiently alleged. The indictment alleges that the tobacco in fact entered upon its interstate shipment; that then the defendants unlawfully did knowingly conspire together and engage in a conspiracy among themselves, in restraint of said interstate trade and commerce so carried on by said Osborne and said railroad company; that one means of such conspiracy participated in by defendants was to frighten Ramsey for the purpose of preventing him from shipping this tobacco to Cincinnati, to which point it had been consigned; that another means was to compel Osborne to remove this tobacco, consigned as aforesaid; that another means was by taking the tobacco by force from the railroad, and thereby, to prevent the transportation of said tobacco from Dry Ridge, Ky., to Cincinnati, Ohio; that then they were to use every means in their power to prevent Osborne from shipping said tobacco from Kentucky to Ohio. We cannot doubt that the defendants were by these allegations fairly charged with knowing at the time that their conspiracy was directed against tobacco which was in the course of shipment out of the State; and whether they were fairly so charged is the test of sufficiency. *Foster v. U. S.*, 178 Fed. 165, 171, 172, 101 C. C. A. 485, and cases cited.

The indictment is further attacked because so many different, contemplated means of accomplishing the conspiracy are alleged, and it is said that this makes the indictment vague and uncertain. It is not open to this objection. The allegations of the various means in contemplation are not of simultaneous and inconsistent plans, but plans for successive action, one step of which should be taken if previous steps failed. Complaint as to such an indictment would come with better force from the Government which might have been embarrassed by so specific an allegation of all the plans involved.

[5] 8. Admission of evidence. To the evidence offered many objections were made and overruled, and on these

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rulings error is now assigned. In most instances the objection was without any stated ground. It was only, "We object." Error cannot be well assigned on such a record. *Foster v. U. S.*, 178 Fed. 165, 176, 177, 101 C. C. A. 485. However, we prefer to consider the merits of those objections which seem more important.

[6] The Government was allowed, in many instances, to show statements or conduct by one respondent in promoting or executing the conspiracy, but not in the presence of or with the knowledge of other respondents. The others would have been entitled to an instruction that such evidence should be considered only as against the one until the jury was otherwise satisfied that the conspiracy existed, and that the others were parties. They did not ask such instruction, nor do we find from record of the trial or the charge that such instruction was given in that precise form, although such rule was substantially stated in the general charge. We think it proper during the progress of a conspiracy trial, and when of necessity items of evidence are being received which, at the time, are competent against only one defendant, to caution the jury as to the lawful effect of such evidence; and to do so frequently enough so that the trial court may be sure the jury understands the distinctions which should be made. Indeed, a direct instruction to the jury on this subject, at an early stage of the trial, may often be advisable; but it does not follow that judgment of conviction should be reversed because the record does not show that the court of its own motion gave such caution. The judge may know from what has been said in argument by counsel before the jury, or in casual discussion not taken down by the reporter, or from the jurors' experience in previous trials, that they do understand the proper effect of such evidence. Certainly we will not presume prejudice from the court's failure to make a distinction of this kind, in a case where he was not asked so to do.

[7] Mrs. Osborne was permitted to testify to a conversation with the respondent Webb, January 14, 1908. Mrs. Osborne says:

"He told me my husband could now ship his tobacco off; that they had concluded to let it go. He says, we are going to let it go now, that others are shipping."

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[8] This is objected to because it is said there is no evidence that the conspiracy was still existing, and because the statements of one conspirator, after the object of the conspiracy is accomplished, are not receivable against the others. The rule is clear enough, but not its application. The fair import of this conspiracy was not merely to remove the tobacco from interstate commerce on November 28th, but to keep it removed. A conspiracy is a continuing offense, until its object is fully accomplished, and we see no reason to doubt from this record that whatever conspiracy there was continued until January 14th. There is no evidence that it had ceased.

[8] 4. The charge to the jury. The case for the Government was made by the testimony of 14 witnesses, some of whom were cross-examined at length. The respondents introduced one witness, who testified to their good character, and then rested. The case was then argued to the jury by the counsel for the Government and by three counsel for the respondents. The court then charged the jury, and, in the course of such charge, made a general review or summing up of the evidence, expressing, in many cases, his view of its force. At the conclusion of such summary he repeated in differing forms that the issues were for the jury to decide according to its conviction, and said:

"It is true, as counsel has stated, that you are the triers of these facts. It is for you to determine them."

After the charge had been finished and exceptions taken, he additionally instructed the jury:

"Gentlemen of the jury, a word or two about what I said with reference to what took place in regard to this tobacco. I have said that certain facts are shown by the evidence, or used the expression 'the evidence shows.' What I meant to say was that the testimony of the witnesses was to the facts as stated. You are the judges of the credibility of the witnesses and the weight to be attached to their testimony, and of the facts shown by their testimony. I have aimed to state all the facts and circumstances testified to in this case. If I have omitted any, you will bear them in mind and give them such weight as they are entitled to."

In the course of his summary of evidence, the court said:

"There is no room for question that it was known by the parties who may be guilty as charged here that it was intended for shipment to Cincinnati, Ohio."

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The evidence, if credible, did show beyond question that each of the respondents was present at the taking of these hogsheads at the station, loading them into the wagons and carrying them away, and that each hogshead was prominently marked with its destination.

Referring to the good character evidence, the court said:

"This is all the evidence that has been introduced before you favoring the defendants."

And, speaking generally of the Government's evidence, further said:

"That evidence, so far as it goes, has not been contradicted by any witness. There is no conflict in the evidence. * * * There is no conflict whatever in the evidence here, save in so far as the showing by these wit [9] nesses may be antagonized by the presumption of innocence, and the fact that these defendants are in good standing."

Elsewhere the jury was fully instructed as to the rule of presumption of innocence and of reasonable doubt. Counsel argue that these instructions were wrong, because the cross-examination of the Government's witnesses furnished evidence for respondents and raised conflicts in the evidence, and because such instructions foreclosed the credibility of the Government's witnesses.

With reference to these two recited comments on the evidence, we think that in connection with the other instructions and cautions to the jury they were not beyond the proper limits of that discretion which judges of Federal courts have in this particular. *Simmons v. U. S.*, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968.

Referring to the visit at Osborne's house Thursday evening by Webb, Carter, and Conrad, and to what they said to Osborne, the court said:

"Under the evidence, and there is no room for difference of opinion as to the matter, that was a threat to Osborne that, if he did not assign over the bill of lading, his tobacco would be destroyed. It was under that threat that he assigned and turned over his bill of lading."

It was the theory of these three respondents that they had learned of the plan to take the tobacco away from the railroad, and perhaps destroy it, but had no part in such plan, and that they went to Osborne merely as a friendly act to warn him of the existence of the danger, and to advise with him as to whether it would not be wiser for him to yield his

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position. Under the evidence, there is no room for difference of opinion that Osborne received from these visitors a threat. There is room for difference of opinion whether the threat was by them as to what they would do or what would be done with their approval, or whether they were merely conveying to Osborne information that a threat was being made by others. If their visit to him and their whole connection with the entire transaction were of this latter character only, they were not guilty under the indictment, and they were entitled to have from the court a specific instruction of this character; but if any of the associates, in a conspiracy like this, were really attempting to accomplish its object, it would be very natural for them to accompany their visit to Osborne with protests of their personal friendship and their personal efforts to protect him, and these protestations in this case, made under such circumstances, were merely evidence to be considered by the jury in connection with everything else done by these three men in determining the real character of their actions. The case was of that class where adverse inferences of a broad and general, and perhaps a natural, character, may be drawn against respondents from the conceded facts, but where, under a specific theory of their application, those facts may be consistent with innocence. Respondents did not request any such specific instructions. It is not to be supposed that respondents' counsel failed to argue to the jury, with the same force with which they have argued the same point in this court, that, if these three defendants did not in fact participate in the conspiracy but only carried a friend [10] ly warning, they were not guilty. Then the jury was instructed that what these respondents said to Osborne was a threat—an instruction which, as we have seen, was broadly correct, but did not completely differentiate. The jury was further instructed that it could not convict any one respondent until it was satisfied that he had participated in the conspiracy, and that the question whether each one did so participate was a question of fact for the jury. Under all of the conditions attending this charge, we will not presume any prejudice to these three respondents from the lack of a specific instruction on this theory.

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[9] Respondents' counsel urge in this court that under the Kentucky procedure it is the duty of the trial judge to give to the jury "the whole law," and that respondents, in a criminal case, carry no such burden as we, by these conclusions, put upon them. This is a matter pertaining to the conducting of the trial itself by the trial judge, and it is not governed by the conformity act. R. S. § 914 (U. S. Comp. St. 1901, p. 684); *Knight v. Ill. Centr. R. Co.* (C. C. A. 6th Circuit) 180 Fed. 368, 372, 103 C. C. A. 514.

[10] No such rule, to the broad extent to which counsel now claim for it, exists in the Federal courts. True, the trial judge should instruct the jury as to the whole law in one sense of that phrase, but if there are particular theories of fact or constructions of evidence which, if adopted, would take the respondents out of otherwise proper, general inferences, or if the counsel thought that the jury should have particular instructions as to the effect of certain evidence upon an individual defendant, or with reference to other matters of like character, respondents cannot complain of an omission of such instruction by the court, if they did not bring such matters to his specific attention by appropriate request. The trial judge, in the trial of an indictment for conspiracy against several respondents and where the evidence is circumstantial, has burden enough in properly conducting the trial, if he receives from counsel on both sides all the aid which they can give to prevent the overlooking of details.

[11] 5. Instructed verdict. Each of the respondents moved for an instructed verdict of acquittal, and each now insists that there was against him no evidence justifying submission. We do not take this view of the record. If the evidence was credible, the existence of a conspiracy to prevent this shipment was perfectly clear. It was also undisputed that each of these respondents was present in the crowd on Friday morning when the object of the conspiracy was accomplished by taking the tobacco away and when notice was given to the railroad agent that he must not accept any more such tobacco for shipment. In this general action all the respondents were apparently joining,

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and the participation of several of them in the conspiracy is indicated by other evidence relating to other times. While it would have been within the province of the jury, upon this record, to acquit any or all of the respondents, it is not easy to understand their purpose in their actions Friday morning and their other established conduct, unless they were intending to co-operate in stopping the shipment of this tobacco or any more like it. It is not necessary to find [11] that any respondent desired personal injury to Osborne or destruction of his property. Very likely they hoped to avoid these results; but the offense might be complete without either of these elements.

The record does not indicate to us any miscarriage of justice, and the several respective judgments of conviction and sentences will be affirmed.

 HEIKE ET AL. v. UNITED STATES.*

(Circuit Court of Appeals, Second Circuit. October 10, 1911.)

[192 Fed. Rep., 83.]

CRIMINAL LAW (§ 42)—IMMUNITY TO ONE FURNISHING EVIDENCE—CONSTRUCTION OF STATUTE.—Testimony given by an officer of a corporation before a Federal grand jury investigating charges of violation of the Anti-Trust Law by the cor [84] poration, which consisted in statements of facts shown by the records of the corporation which he produced in obedience to a subpoena duces tecum, does not entitle him to immunity from prosecution for an offense against the United States committed in his official capacity, but which has no connection with the matter then being investigated under act Feb. 25, 1908, c. 755, § 1, 32 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 1142), which provides with respect to the Anti-Trust Act and others mentioned that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts."^b

(Ed. Note.—for other cases, see Criminal Law. Cent. Dig. §§ 45-48; Dec. Dig. § 42.)

* For opinion of the Supreme Court affirming the judgment (227 U. S., 131), see post, page 449.

^b Syllabus copyrighted, 1912, by West Publishing Company.

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CRIMINAL LAW (§ 42)—IMMUNITY TO ONE FURNISHING EVIDENCE—CONSTRUCTION OF STATUTE—"TESTIFY"—"PRODUCE EVIDENCE."—Statements compiled by employes of a corporation from its books and records, which were before a grand jury and produced to the grand jury by an officer of the corporation on a subpoena duces tecum, do not constitute testimony given or documentary evidence produced by such officer within the meaning of act Feb. 25, 1903, c. 755, § 1, 32 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 1142), which grants immunity in certain cases to a witness "on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise"; the preparation or production of the statements in such case being the act of the corporation, and not of the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 45-48; Dec. Dig. § 42.

For other definitions, see Words and Phrases, vol. 6, p. 5654; vol. 8, p. 6862.]

* * * * *

[86] In Error to the Circuit Court of the United States for the Southern District of New York.

Prosecution by the United States against Charles R. Heike and Ernest W. Gebracht. From a judgment (175 Fed. 852) of conviction, said defendants bring error. Affirmed.

This cause comes here upon writ of error to review the judgments of conviction against plaintiffs in error. They were indicted together with Bendernagel, Walker, Voelker, and Halligan upon an indictment containing six counts. The first four charged that defendants "did unlawfully and knowingly make and effect and aid in effecting" the entry of certain specified cargoes of raw sugar at less than their true weight. The fifth count charged that the defendants had conspired "to defraud the United States" of lawful duties upon importations of raw sugar by effecting the liquidation of duties thereon at less than their true weight. The sixth count charged that defendants had conspired on March 1, 1907, "to commit offenses against the United States in and by knowingly making and effecting and aiding in effecting, at less than their true weights, and by means of false and fraudulent written statements as to said weights, entries of certain goods, wares, and [87] merchandise," to wit, certain dutiable raw sugars which theretofore

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had been imported and thereafter were continuously to be imported into the port and collection district of New York. Of the overt acts set forth in the sixth count, four only named Heike. They charged his indorsement of four checks from the United States to the American Sugar Refining Company, purporting to represent respectively an excess of deposits for duties on four different cargoes, but actually representing part of the duties then and there lawfully due to the United States upon these four cargoes.

Heike was secretary of the American Sugar Refining Company, which is a New Jersey corporation. He was also secretary and treasurer of the American Sugar Refining Company of New York. Gebracht was superintendent of the Havemeyer & Elder refinery. Bendernagel was cashier of the refinery. Walker was assistant superintendent of the refinery's docks. Voelker and Halligan were checkers on the docks.

In the course of the trial Walker, Voelker, and Halligan pleaded guilty. The jury found Heike guilty on the sixth count only, and Gebracht guilty as charged in the indictment, on all counts. They reported that they could not agree on a verdict as to Bendernagel.

George S. Graham and John B. Stanchfield (Charles H. Tuttle and William M. Parke, of counsel), for plaintiff in error Heike.

G. M. Mackellar, for plaintiff in error Gebracht.

Henry A. Wise, U. S. Atty. (Henry L. Stimson, Winfred T. Denison, and Felix Frankfurter, Asst. U. S. Atty., of counsel), for the United States.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above).

Heike filed a special plea in bar, upon which a trial was had and a verdict directed against him by the court. This will be first considered. It will not be necessary to go into

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the history of the plea nor to enumerate the various motions and exceptions by which it was presented. Suffice it is to say that the point relied upon by him was properly submitted, and the broad question whether upon the facts shown he was entitled to "immunity" under the acts of Congress must be decided.

[1] The act of February 11, 1893, c. 83, 27 Stat. 443 (U. S. Comp. St. 1901, p. 3173), provides that no person shall be excused from attending and testifying or from producing books, papers, etc., before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the interstate commerce acts, "on the ground or for the reason that the testimony, or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission or in obedience to its subpoena," etc.

The appropriation act of February 25, 1903, c. 755, § 1, 32 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 1142), enumerates several statutes, including the Anti-Trust Act of July 2, 1890 (act July 2, 1890, [88] c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and provides that:

"No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution, under said acts."

This statute was amended by the act of June 30, 1906, c. 3920, 34 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1168), by adding the provision that such "immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

On various dates in 1909 and 1910 certain grand jurors of the United States Circuit Court, Southern District of New York, were making inquiry into transactions of the American Sugar Refining Company. One branch of in-

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quiry was in reference to the acquisition and closing up of the Pennsylvania Sugar Refining Company of Philadelphia, arising on the so-called Kissel-Segal loan. The details are sufficiently set forth in *Pennsylvania Sugar Refining Company v. American Sugar Refining Company*, 166 Fed. 254, 92 C. C. A. 318. These transactions were contended to be a violation of the Anti-Trust Act. The other inquiry was also concerned with alleged violations of the same act. In the first of these inquiries a subpoena duces tecum was directed to "Charles R. Heike, secretary of the American Sugar Refining Company," and served upon him. By it he was summoned to testify and was ordered to bring with him all records of the company, etc., showing minutes of the directors' executive committee relative to the Kissel-Segal loan, and also minutes of the board of directors and all other evidences and writings in his custody concerning the premises. A second subpoena called for certain letters and press copies relating to these transactions. In the other inquiry a subpoena duces tecum was directed to "Charles R. Heike, secretary of the American Sugar Refining Company, and secretary of the American Sugar Refining Company of New York," and served upon him. By it he was summoned to testify and ordered to bring with him certain books and papers of both companies. He obeyed these subpoenas, testified before both these grand juries, and produced various records and papers of the two companies. The question now presented is whether the testimony which he gave and the production of the records and papers which he laid before the grand juries secure him immunity from this prosecution, which has nothing to do with the Anti-Trust Act and is concerned only with certain frauds in connection with the weighing of dutiable goods, whereby the Government was deprived of duties which it should have received.

The argument as to the precise measure of immunity secured by the statute has been quite extended and a construction of the act contended for which we do not find it necessary now to pass upon when the sum total of all that Heike testified to under these subpoenas is enumerated it

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seems to us to fall so far short of what the statute plainly contemplates that there is little left to be said.

He testified, of course, that he was the person to whom the sub[89]poenas were addressed, secretary of the New York corporation and secretary and treasurer of the New Jersey corporation. That circumstance was well known when the subpoenas were prepared and addressed to him; he held these offices for many years; his official position was matter of record. To interpret the statute as securing immunity to an officer of a company for offenses committed while such officer, merely because he has stated under oath on some prior investigation that he was an officer, seems to us preposterous.

He testified as to the corporate history of the American Sugar Refining Company, of what prior concerns it was composed, and what refineries and other property it acquired, what stock (of its components) it exchanged its own for. But all this was merely a recital of what was disclosed by the books and papers of the corporation, which it had turned over through him to the grand juries themselves. Indeed, in these records and documents was the best competent evidence of its corporate history to be found; Heike's so-called "testimony" as to these subjects was but the preparation of an index to what they disclosed.

He testified before one of the grand juries that four certain checks of the American Sugar Refining Company which represented the Segal-Kissel loan were signed by him as treasurer; he looked at the checks and testified that he wrote the signatures. This was testimony given under oath in obedience to a subpoena; but he was not prosecuted in this action, nor was it sought to subject him to any penalty for or on account of the transaction, matter, or thing concerning which he so testified. There was no question in this action of the Segal-Kissel transaction. The four overt acts charged under the sixth count related to his signature of four checks; but the Government did not seek to use the Segal-Kissel checks to make proof of his signature to the others. It is conceded that his admitted handwriting on the Segal checks could not even be used as standards of comparison to estab-

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lish the signature to ones referred to in the sixth count (*Hickory v. U. S.*, 151 U. S. 308, 14 Sup. Ct. 334, 38 L. Ed. 170), and no effort was made to do so. The suggestion that comparison of the signatures on the four checks of the sixth count with the four signatures on the Segal checks would have "enabled the investigator to determine that they were made by the same man and were in one and the same handwriting" seems to us overstrained. As secretary for many years of both companies, signatures concededly Heike's were scattered broadcast by thousands through the community. Indeed, no comparison was needed. The identity of name and office was quite sufficient for the investigator. Proof of the genuineness of the signatures of the sixth count was easily to be found without any reference to the testimony before the grand juries.

[2] There was furnished to the second grand jury a statement giving actual meltings of each company operated by the American from 1887 to 1907, showing the pounds of sugar melted each year in each refinery, which included the amount melted by the Havemeyer & Elder Refinery for the period covered by the prosecution. This statement was produced by Heike. On the trial of the present indictment [90] it was essential to show the true weights of certain importations, and in order to enable the jury to determine what they were proof was made of the quantity actually melted at that refinery. As to these meltings the plaintiff in error contends:

"But the kernel of the case lies in the proof of the actual meltings and the quantity of sugar produced at the Havemeyer & Elder Refinery. These meltings represented the weights made by the custom-house employes on the dock. These weights presented the basis upon which were prepared the calculations and statistical table which were later on in the trial presented to the jury, and which purported to show that the result in manufactured product was greater than warranted by the number of pounds of sugar melted. This fact Mr. Heike testified to (before the grand jury)."

The Government contends that this statement of total meltings was volunteered by Heike, and there is some uncertainty as to just how it was furnished. We disregard this, however, and will assume that the grand jury subpoena called

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for just such a statement, and that it was furnished to the grand jury in response to such a call.

It seems to us, however, that this statement was not in any true sense "testimony given" or "documentary evidence produced" by Charles R. Heike before the grand jury. Personally he knew nothing about the meltings and could himself give no competent testimony. As an officer of the company, he could require its clerks to prepare such statement from the records, which the grand jury already had under the subpoena duces tecum. The weighers who noted the scales and called off the readings, the checkers who recorded the amounts, the clerks who transcribed such records in the books, the corporation which had such weighings made and which preserved the records of them, the clerks who subsequently tabulated these records, may fairly be said to have contributed, each of them, testimony essential to proving that the tabulation was an accurate statement of the total weighings; but we cannot see that Heike had anything to do with it, except to inform the last series of clerks that the corporation which employed them wished them to make such a statement. When it was thus made up by the corporation, it certainly would be a matter of no importance whether it was actually transported to the grand jury room by one officer or employe or by some other one. The distinction between a corporation and its officers has not always been closely adhered to; but such distinction is accentuated in *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771 (May 11, 1911), where it is held that the subpoena duces tecum may properly be addressed directly to the corporation. The statement of meltings being a document prepared for the grand jury by the corporation and which the corporation under the subpoena was obligated to turn over to the grand jury, no matter which officer had the immediate custody of it, we fail to see why the performance of that corporation obligation to deliver the document by one of its officers can give him personal immunity in regard to anything which such statement, to which he has contributed nothing, contains.

Syllabus.

The assignments of error which deal with the disposition of Heike's special pleas are therefore overruled.

* * * *

[101] The judgment of the circuit court is affirmed.

HEIKE v. UNITED STATES.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 520. Argued January 9, 1913.—Decided January 27, 1913.

[227 U. S. 131.]

There is a clear distinction between an amnesty for crime committed and the constitutional protection under the fifth amendment from being compelled to be a witness against oneself.^b

The obvious purpose of the act of February 25, 1903, c. 755, 32 Stat. 854, 904, granting to witnesses in investigations of violations of the Sherman Act immunity against prosecution for matters testified to, was to obtain evidence that otherwise could not be obtained; the act was not intended as a gratuity to crime, and is to be construed, as far as possible, as coterminous with the privilege of the person concerned.

Evidence given in an investigation under the Sherman Act does not make a basis under the act of February 25, 1903, for immunity of the witness against prosecutions for crimes with which the matters testified about were only remotely connected.

Granting a separate trial to one of several jointly indicted for conspiracy is within the discretion of the trial judge, reviewable only in case of abuse.

Even if there may have been an abuse in some instances of indicting under § 5440 for conspiracy instead of for the substantive crime itself, liability for conspiracy is not taken away by its success, and in a case such as this, there does not appear to be any abuse.

Evidence showing that a conspiracy had continued before and after the periods specified in the indictment, held in this case not inadmissible against a defendant present at the various times testified to. 192 Fed. Rep. 83, affirmed.

* For opinion of Circuit Court of Appeals (192 Fed. 83) see *ante*, page 441.

^b Syllabus and statements of arguments copyrighted, 1913, by The Banks Law Publishing Company.

Argument for Petitioner.

The facts, which involve the extent of immunity granted under the act of February 25, 1903, c. 755, 32 Stat. 854, 904, are stated in the opinion.

Mr. John B. Stanchfield, with whom *Mr. George S. Graham* and *Mr. Frederick Allis* were on the brief, for petitioner:

[132] The immunity statute herein pleaded in bar is a grant of amnesty from the sovereign, operating by way of a pardon from the Government. It bears no analogy, either in conditions of acquirement or in mode of operation, to the constitutional privilege of the fifth amendment.

There is a fundamental distinction between the constitutional privilege and the statutory immunity. It is apparent on the very face thereof.

The first proceeds upon the theory of a shield against compulsory self-incrimination, given by sovereign to citizen.

The second proceeds upon the theory of a pardon or amnesty, given by the Government to the citizen.

Even if the immunity should receive a strict and narrow construction because it is "in derogation of the sovereign power to punish," and public policy may favor a narrow, and is opposed to a broad, view of the immunity provision, on the other hand, the pardon theory of immunity affords a complete refutation of any narrow rule of construction, and public policy requires a broad construction of the immunity provision.

The plain language of the statute itself shows that it confers general amnesty, and should operate as a pardon, and not in the way the old constitutional privilege does. See act of January 24, 1862, § 103, Rev. Stat.; § 859, Rev. Stat.; act of January 24, 1862, c. 11, 12 Stat. 333; § 860, Rev. Stat.; act of February 25, 1868, c. 13, § 1; 15 Stat. 37; act of February 11, 1893, 27 Stat. 443; *Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591.

The absurdity and impossibility of imposing all the conditions and limitations of the constitutional privilege shows that the immunity statute was intended to operate as a grant of amnesty or pardon.

Argument for Petitioner.

The public policy of the statute shows that it should operate as a grant of amnesty or pardon. *United States v. Armour*, 142 Fed. Rep. 819, 826.

[133] The weight of authority shows that the immunity statute is an act of general amnesty, and therefore should operate as a pardon from the Government. *Brown v. Walker*, 161 U. S. 591; *Burrell v. Montana*, 194 U. S. 572, 578; *Hale v. Henkel*, 201 U. S. 43, 67; *United States v. Price*, 96 Fed. Rep. 962; *United States v. Swift*, 186 Fed. Rep. 1002. *State v. Murphy*, 107 N. W. Rep. 470, distinguished.

The pardon or amnesty theory of the immunity statute affords a complete refutation (1) of every argument advanced by the Government, (2) of every ground for the opinion of the learned trial court, save one, (3) and of every ground assigned by the learned Court of Appeals without exception, in opposition to the plea in bar herein.

The authorities cited by the Government for its contentions, or those of the court below, are not in point, if the immunity statute be treated as a statute of amnesty.

There are but three cases in which the witness has pleaded the immunity statute in bar to a prosecution. *United States v. Armour*, 142 Fed. Rep. 808; *United States v. Swift*, 186 Fed. Rep. 1002; *State v. Murphy*, 107 N. W. Rep. 470.

It would seem to follow from this review of cited cases, none of which support the contention of the Government that the immunity statute of 1908 is merely a defense against self-incrimination, requiring to be pleaded as a privilege, and extending no further than the exclusion of testimony given; nor anything against the contention that the statute grants general amnesty to witnesses, as this court has said, operating in every case to which it is applicable, *ex proprio vigore* as a pardon does.

The petitioner's former testimony was "concerning" the "transaction, matter or thing" on account of which he is being prosecuted, within the meaning of the statute; although the particular offense for which he has been indicted was not the direct subject of the inquiry at which [134] he testified; yet it was incidentally discovered, led up to and prosecuted by means of his testimony.

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The word "concerning" should receive the broadest possible construction. *Brown v. Walker*, 161 U. S. 623; *United States v. Burr*, 25 Fed. Cas. 40; *Counselman v. Hitchcock*, 142 U. S. 564, 569; *Hale v. Henkel*, 201 U. S. 67; *Boyd v. United States*, 116 U. S. 616, 629; *People v. Forbes*, 143 N. Y. 219, 228; *Am. Lithographic Co. v. Werckmeister*, 221 U. S. 603, 611.

Whether or not the immunity statute should receive a broad application is a political question, and the policy adopted by Congress is final and binding on all.

Public policy is a political question, and it is the province of Congress, in the first place, to determine the public policy of every statute it enacts. *Pennsylvania v. Wheeling*, 18 How. 440; *Rhode Island v. Massachusetts*, 12 Pet. 737, 738; *Luther v. Borden*, 7 How. 42; *William v. Suffolk, &c.*, 13 Pet. 420; *Foster v. Neilson*, 2 Pet. 253; *Head Money Cases*, 112 U. S. 598; *United States v. Rauscher*, 119 U. S. 418, 419; *United States v. Collins*, 25 Fed. Cas. 550; *United States v. Armour*, 142 Fed. Rep. 826.

The pleadings, on the plea in bar, afforded sufficient evidence on the question of relevancy to make it error to direct the verdict on the special trial of the plea.

The Circuit Court of Appeals erred in holding that petitioner was entitled to no immunity because he was subpoenaed and testified as an officer of the corporation under investigation at the anti-trust proceeding, where he gave the evidence he now relies on. *State v. Nowell*, 58 N. H. 314; *Brown v. Walker*, 161 U. S. 602; *Hale v. Henkel*, 201 U. S. 69-70. *Wilson v. United States*, 221 U. S. 361, distinguished. And see *B. & O. v. Int. Com. Comm.* 221 U. S. 612; *Am. Lith. Co. v. Werckmeister*, 221 U. S. 611; *Int. Com. Comm. v. Baird*, 194 U. S. 25.

The court below erred in denying the motion of the defendant Heike for a separate trial. He was unlawfully [185] prejudiced by being tried together with the other defendants.

No man can receive a fair trial if he is forced to stand in a background of fraud and knavery created by the acts of others but which necessarily throw their dubious gloom

Argument for Petitioner.

over his own conduct and impart a sinister significance to his most innocent acts. *White v. The People*, 81 Illinois, 388; *State v. Oxendine*, 107 Nor. Car. 783.

In addition, the defendant was greatly prejudiced by the fact that during the course of the trial three of the other defendants pleaded guilty. This turn of events should, it is submitted, have induced the court to grant to the defendant Heike a separate trial. *United States v. Matthews*, Fed. Cas. No. 15741b; *Krause v. United States*, 147 Fed. Rep. 444.

While the lower court had discretion upon the motion for a severance, *United States v. Marchant*, 12 Wheat. 480; *United States v. Ball*, 163 U. S. 662, it does not follow, however, that the granting or denial of the motion is not subject to review by this court. *O'Connell v. Pennsylvania Co.*, 118 Fed. Rep. 991; *Osborne v. The Bank*, 9 Wheat. 738, 866; *Krause v. United States*, 147 Fed. Rep. 444; *White v. People*, *supra*; *Morrow v. The State*, 14 Lea (Tenn.), 483; *Watson v. The State*, 16 Lea, 604; *State v. Desroche*, 47 La. Ann. 651.

It was error to convict petitioner on the sixth count, for conspiracy.

It has become customary for prosecutors to charge conspiracy rather than the commission of actual crime in their indictments, especially statutory crimes of the class under consideration. Although relying on the same evidence, they find it easier to convince a jury of secret conspiracy than of a palpable crime; it opens the door to metaphysical speculation in place of dry proof; the inquiry is into intentions rather than acts; it is a reversion to all the evils of the old practice when the trial was of a [136] conspiracy in the minds of the conspirators without overt acts to show it. This is abuse. See *United States v. Kissel*, 173 Fed. Rep. 823, 828; Wharton's Criminal Law, § 1402.

The circumstantial evidence, from which alone the jury inferred petitioner's participation in and knowledge of the frauds in question, was not legally sufficient for those purposes; the learned trial court erred in allowing the jury to draw such inference, and the learned Court of Appeals erred in affirming the judgment in that respect.

Argument for the United States.

The learned trial court committed reversible error in admitting in evidence the so-called "pink books." *Chicago Lumbering Co. v. Hewitt*, 64 Fed. Rep. 314; *Kent v. Garvin*, 1 Gray, 148; *Gould v. Hartley*, 187 Massachusetts, 561; *Norwalk v. Ireland*, 68 Connecticut, 1; *Swan v. Thurman*, 112 Michigan, 416; *People v. Mitchell*, 94 California, 550; *Price v. Standard Life Co.*, 90 Minnesota, 264; *Chaffee v. United States*, 18 Wall. 516.

The admission of hearsay evidence, in addition to the ordinary error, violated the right of accused to be confronted with the witnesses against him. United States Constitution, 6th Amendment; *Motes v. United States*, 178 U. S. 458; *Kirby v. United States*, 174 U. S. 47; Cooley on Constitutional Limitations, 7th ed., p. 451; *People v. Bromwich*, 200 N. Y. 385; *State v. Thomas*, 64 Nor. Car. 74; *United States v. Angell*, 11 Fed. Rep. 84, 43; *People v. Goodrode*, 182 Michigan, 542.

The trial court committed reversible error in allowing in evidence acts and declarations of a co-conspirator thirteen years prior to the conspiracy. *Logan v. United States*, 144 U. S. 263; *Train v. Taylor*, 51 Hun (N. Y.), 215; *State v. Crofford*, 121 Iowa, 395; *Williams v. Dickinson*, 28 Florida, 90; *Wilson v. People*, 94 Illinois, 299; *People v. Irwin*, 77 California, 494; *State v. Moberly*, 121 Missouri, 604.

[187] *Mr. Assistant Attorney General Denison*, with whom *Mr. Henry L. Stimson* and *Mr. Felix Frankfurter* were on the brief, for the United States.

The plea of immunity was not well founded. *Hale v. Henkel*, 201 U. S. 43, 69; *Brown v. Walker*, 161 U. S. 591; *United States v. Swift*, 186 Fed. Rep. 1002; *United States v. Armour*, 142 Fed. Rep. 808; *State v. Murphy*, 128 Wisconsin, 201; *State v. Warner*, 13 Lea (Tenn.), 52, 62-64; *In re Kittle*, 180 Fed. Rep. 946, 948 (So. Dist., N. Y.); *United States v. Kimball*, 117 Fed. Rep. 156, 163, 166, 168.

The immunity provisions are statutes in derogation of essential governmental powers, and as such should not be extended beyond the purpose of their enactment. *Louisville Railway v. Kentucky*, 161 U. S. 677, 685; *United*

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States v. Burr, 25 Fed. Cas., pp. 39-40; *Hale v. Henkel*, *supra*; *American Lithographic Company v. Werckmeister*, 221 U. S. 603; Wigmore on Evidence, § 2192.

The purpose of the immunity statutes, as shown by their structure and their historical evolution, was to prevent the obstruction of the specified prosecutions by the exercise of the constitutional privilege. This purpose was accomplished by an exchange of immunity for the privilege. There is nothing either in the terms of the act or its history to indicate any intention of granting a bonus in addition to this exchange.

The form of the act of February 11, 1893, is a balance indicating an exchange. The clause beginning "But" is in relation to and a plain exchange for the clause which withdraws the "excuse" from testifying on the ground of incrimination.

Also the word "concerning" indicates a real connection with a crime analogous to the connection which would raise the privilege.

The theory of petitioner's brief, that the purpose of Congress was to "encourage volunteer witnesses" and to "persuade" them to testify, by giving them "a reward" [138] of absolution from all crimes, has nothing whatever to base itself on. It was repudiated by Judge Carpenter in the *Swift case*, *supra*, and by Wigmore in the passage quoted, *supra*.

Congress has been exceedingly conservative in the enactment of statutes granting immunity. Instead of passing a general immunity statute, it has gone step by step, granting no greater immunity than was necessary for the enforcement of the various commerce laws. Section 860 of the Revised Statutes; *Counselman v. Hitchcock*, 142 U. S. 547; act of February 11, 1893 (27 Stat. 443, see appendix); *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 611; *Brown v. Walker*, 161 U. S. 591; *Foots v. Buchanan*, 113 Fed. Rep. 156; act of February 25, 1903, *supra*; *Hale v. Henkel*, *supra*; *United States v. Armour*, *supra*; act of June 30, 1906 (34 Stat. 798, appendix); act of March 2, 1907, c. 2564, 34 Stat. 1246; *United States v. Kimball*, *supra*.

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No possible public policy calls for an extension of the immunity statute to the giving of innocent evidence not protected by the constitutional privilege. *State v. Murphy, supra.*

None of the evidence adduced by Heike was incriminating, and none of it could have been withheld by him under the constitutional privilege. *United States v. Burr, supra; Brown v. Walker, supra; Queen v. Boyes*, 1 B. & S. 311, 321; *Ex parte Irvine*, 74 Fed. Rep. 960; *United States v. Price*, 163 Fed. Rep. 904, 907; *Hickory v. United States*, 151 U. S. 303; *Hayden v. Williams*, 96 Fed. Rep. 279, 281-282; *Wilson v. United States*, 221 U. S. 361; *Dreier v. United States*, 221 U. S. 394; *B. & O. v. Int. Com. Comm.*, 291 U. S. 612.

The immunity statutes do not grant immunity excepting for offenses under the acts to which they refer. As to evidence tending to incriminate a witness of other offenses entirely unrelated to such acts, he still retains the constitutional privilege. *Beutell v. Magone*, 157 U. S. 154, 157, 158; *State v. Ellsworth*, 131 Nor. Car. 773; *Commonwealth v. Daly*, 4 Gray (Mass.), 209; *Rudolph v. State*, 128 Wisconsin, 222, 226.

The admission of the so-called "pink books" on the trial of the plea of not guilty was not error.

An unnecessarily complete foundation was laid for these books. *Chicago Lumbering Co. v. Hewitt*, 64 Fed. Rep. 314; *Miss. Logging Co. v. Robsen*, 69 Fed. Rep. 773, 781, 782 (C. C. A. 8th Cir.); *Greene v. United States*, 154 Fed. Rep. 401; *Kerroh v. United States*, 171 Fed. Rep. 366, 369; *Grunberg v. United States*, 145 Fed. Rep. 81, 91; *Bacon v. United States*, 97 Fed. Rep. 35, 40-41; 1 Wigmore on Evidence, § 1521, pp. 1888-89, and § 1530, pp. 1895-96; *Continental Bank v. National Bank*, 108 Tennessee, 374.

The admission on the main trial of the testimony of Spitzer concerning the early history of the conspiracy was not error. *United States v. Kissell, supra; Wood v. United States*, 16 Pet. 342, 360-361; *Bottomly v. United States*, 1 Story, 135; *United States v. 36 Barrels*, 7 Blatch. 469, 472; *Standard Oil Co. v. United States*, 221 U. S. 1; 3 Greenleaf on Evidence, 16th ed., § 93; *State v. Walker, supra.*

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Mr. Justice HOLMES delivered the opinion of the court.

The petitioner was indicted for frauds on the revenue, and, in the sixth count, under Rev. Stat., § 5440, for a conspiracy to commit such frauds by effecting entries of raw sugars at less than their true weights by means of false written statements as to the same. Rev. Stat., § 5445. Act of June 10, 1890, c. 407, § 9, 26 Stat. 131, 135. He pleaded in bar that, in 1909 and 1910, answering the Government's subpoena, he had testified and produced documentary evidence before a Federal grand jury investigating alleged breaches of the Sherman Anti-Trust Act, that the testimony and documents concerned the subject- [140] matter of the present indictment and that therefore he was exempted from liability by the act of February 25, 1903, c. 755, 32 Stat. 854, 904, as amended June 30, 1906, c. 3920, 34 Stat. 798. There was a replication; issue was joined; a trial was had upon the plea, in which the court directed a verdict for the Government, 175 Fed. Rep. 852; leave was given to plead over; a premature attempt was made to bring the case before this court, 217 U. S. 423, and then there was a trial on the merits in which the petitioner was found guilty on the sixth count. The Circuit Court of Appeals affirmed the judgment, 192 Fed. Rep. 83, 112 C. C. A. 615. Whereupon a writ of certiorari was granted by this court.

The investigation in which the petitioner testified concerned transactions of the American Sugar Refining Company. See *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. Rep. 254. The petitioner was summoned to produce records of the American Sugar Refining Company and to testify. He appeared, produced the records and testified that he was the person to whom the subpoenas were addressed, secretary of the New York corporation and secretary and treasurer of the New Jersey corporation of the same name. He summed up what the books produced showed as to the formation of the New York company. He identified his signature to four checks of the company in a transaction not in question here—the Kissel-Segal loan mentioned in *United States v. Kissel*, 218 U. S. 601, 608. These checks were not used in the present

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case. He testified as to the ownership of the Havemeyer and Elder Refinery in Brooklyn. Finally he produced a table showing how many pounds of sugar were melted each year from 1887 to 1907 in each refinery, this table of course not purporting to represent the petitioner's personal knowledge, but being a summary of reports furnished by the company's different employees, and, the Government contends, volunteered by him.

[141] The act of February 25, 1903, c. 755, 32 Stat. 854, 904, appropriates \$500,000 for the enforcement of the Interstate Commerce and Anti-Trust Acts, "Provided, that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts; Provided further, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying." (This last proviso was added only from superfluous caution and throws no light on the construction. *Glickstein v. United States*, 222 U. S. 139, 143, 144.) By the amendment of June 30, 1906, c. 3920, 34 Stat. 798, immunity under the foregoing and other provisions "shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

The petitioner contended that, as soon as he had testified upon a matter under the Sherman Act, he had an amnesty by the statute from liability for any and every offense that was connected with that matter in any degree, or, at least, every offense toward the discovery of which his testimony led up, even if it had no actual effect in bringing the discovery about. At times the argument seemed to suggest that any testimony, although not incriminating, if relevant to the later charge, brought the amnesty into play. In favor of the broadest construction of the immunity act, it is argued that when it was passed there was an imperious popular demand that the inside working of the trusts should be investigated, and that the people and

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Congress cared so much to secure the necessary evidence that they were willing that some guilty persons should escape, as that reward was necessary to the end. The Government, on the other hand, maintains that the statute should be limited as nearly as may [142] be by the boundaries of the constitutional privilege of which it takes the place.

Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier act of February 11, 1893, c. 83, 27 Stat. 443, which read "No person shall be excused from attending and testifying," &c. "But no person shall be prosecuted," &c., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, "was not coextensive with the constitutional privilege." *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 611. Compare act of February 19, 1903, c. 708, § 3, 32 Stat. 847, 848. To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. See 3 Wigmore, Evidence, § 2261.

There is no need to consider exactly how far the parallelism should be carried. It is to be noticed that the testimony most relied upon was the summary made from the books of the company by its servants, at the petitioner's direction, and simply handed over by him; that apart from the statute the petitioner could not have prevented the production of the books or papers of the company, such as the

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summary was when made, or refused it if [143] he had the custody of them, and that the decisions that established the duty to produce go upon the absence of constitutional privilege, not upon the ground of statutory immunity in such a case. *Wilson v. United States*, 221 U. S. 361, 377 *et seq.* *Dreier v. United States*, 221 U. S. 394, 400. *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 623. *Wheeler v. United States*, 226 U. S. 478. *Grant v. United States*, *ante*, p. 75. But this consideration does not stand alone, for the evidence given in the former proceeding did not concern the present one and had no such tendency to incriminate the petitioner as to have afforded a ground for refusing to give it, even apart from the statute and the fact that it came from the corporation books. Taking all these considerations together we think it plain that the petitioner could take nothing by his plea.

The evidence did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that they all were dealings of the same sugar company. The frauds on the revenue were accomplished by a secret introduction of springs into some of the scales in such a way as to diminish the apparent weight of some sugar imported from abroad. The table of meltings by the year had no bearing on the frauds, as it was not confined to the sugar fraudulently weighed and it does not appear how the number of pounds was made up. The mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds. The same consideration shows that it did not tend to incriminate the witness. It neither led nor could have led to a discovery of his crime. So the admission of his signature to certain checks, although it furnished a possible standard of the petitioner's handwriting if there had [144] been any dispute about it, which there was not, in the circumstances of this case at least had neither connection nor incriminating effect. When the statute speaks of testimony concerning a matter it means concern-

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ing it in a substantial way, just as the constitutional protection is confined to real danger and does not extend to remote possibilities out of the ordinary course of law. *Brown v. Walker*, 161 U. S. 591, 599, 600. See 5 Wigmore, Evidence, § 2281, p. 238. Other questions would have to be dealt with before the petitioner could prevail upon his plea; but as we consider what we have said sufficient, we shall discuss it at no greater length. There was no dispute as to the facts and a verdict upon it for the Government properly was directed by the court.

The other matters complained of would not have warranted the issue of the writ of certiorari and may be dealt with in few words. The petitioner was denied a separate trial, and this is alleged as error. But it does not appear that the discretion confined to the trial judge was abused. *United States v. Ball*, 163 U. S. 662, 672. Again it is said that if the evidence proved the petitioner guilty of a conspiracy it proved him guilty of the substantive offense. It may be that there has been an abuse of indictment for conspiracy, as suggested by Judge Holt in *United States v. Kissel*, 173 Fed. Rep. 823, 828, but it hardly is made clear to us that this is an instance. At all events the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offense at which the conspiracy aims. *Brown v. Elliott*, 225 U. S. 392. *Reg. v. Button*, 11 Q. B. 929. *Res v. Spragg*, 2 Burr. 998, 999.

An objection is urged to the admission of certain books, called the pink books, in evidence—they being the books in which were entered weights given by one set of weighers—the city weighers—the weighers not having been called. These weights were the higher ones and were introduced as evidence of the discrepancy. They appear [145] to have been accepted by the company, were checked by the company's tallymen, who testified, and if other evidence than that of the men who made the entries was necessary it was produced. See 2 Wigmore, Evidence, §§ 1521, 1530. Another objection to evidence concerned the admission of testimony that the same course of conduct was going on long before the date in the indictment when it is alleged that the defendants conspired. The indictment of course

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charged a conspiracy not barred by the statute of limitations, but it was permissible to prove that the course of fraud was entered on long before and kept up. *Wood v. United States*, 16 Pet. 342, 360. *Standard Oil Co. v. United States*, 221 U. S. 1, 76. The acts and directions of earlier date tended to show that the same conspiracy was on foot. The petitioner was there. The time of his becoming a party to it was uncertain. The longer it had lasted the greater the probability that he knew of it and that his acts that helped it were done with knowledge of their effect. We think it unnecessary to discuss the suggestion that the evidence did not warrant leaving the case to the jury, or to add further to the discussion that the case received below.

Judgment affirmed.

UNITED STATES FIRE ESCAPE COUNTERBALANCE CO. v. JOSEPH HALSTED CO.

(District Court, N. D. Illinois, E. D. April 18, 1912.)

[195 Fed. Rep. 295.]

MONOPOLIES (§ 21)—COMBINATIONS—RIGHTS OF MEMBERS.—An assignee of a patent holding under an assignment made in aid of a combination violative of the Sherman Anti-Trust Act (act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 8200]) may sue in equity an infringer of the patent who can not justify his wrongful acts by attacking the assignee as an unlawful combination, since a decree establishing title in the assignee and an infringement by the infringer need not touch the question of illegal combination.*^b

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 15; Dec. Dig. § 21.]

In Equity. Suit by the United States Fire Escape Counterbalance Company against the Joseph Halsted Company. Exceptions to the substituted amendment of answer sustained.

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^b The same general principle is stated in *Coca-Cola Co. v. Deacon Brown Co.*, 200 Fed. 105, 106; *Coca-Cola Co. v. Gay-la Co.*, 200 Fed. 720, 726; *Searchlight Gas Co. v. Prest-o-lite Co.*, 215 Fed. 692, 697.

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Brown & Hopkins, of Chicago, Ill., for complainant.

Hill & Hill, of Chicago, Ill., for defendant.

SANBORN, District Judge.

Exceptions to amendment to answer. An order sustaining exceptions to a part of the original answer having been made, defendant was allowed to amend, and did so, March [296] 15, 1912. Exceptions being made to the amendment and heard, defendant offered a substitute amendment, and made a motion for leave to file April 10, 1912. This motion was granted, the exceptions to the amendment to stand as exceptions to the substitute. The only question is whether the assignment of a patent in aid of a combination made unlawful by the Sherman Act operates to pass title, or is to be treated as absolutely void for all purposes and in all places. May an infringer, one who unlawfully takes the property of another, defend himself on the ground that the property so taken or despoiled became vested in his adversary by an unlawful act? Is the latter to be excluded from the courts because he is himself a lawbreaker, or is his own wrongdoing to be redressed only through the remedies peculiarly applicable?

It is urged that the amendment to the answer shows that the assignment of the patent sued on was made as part of an illegal scheme to monopolize the business of dealing in fire escapes, and that defendant, though alleged to be an infringer, may therefore attack the patent transfer. Stated briefly, the substituted amendment sets out the following: Complainant does not make, use, or sell the patented devices, but is an illegal corporation in the nature of a trust to fix prices or limit output, being merely a holding company. Complainant was organized to acquire patents, and gain control of non-patented devices, for the purpose of suppressing competition and regulating prices of fire escapes. This it does through licensees, who were engaged in making and installing fire escapes prior to complainant's organization. The business of these licensees is substantially the same as before, except that they now pay license fees to complainant.

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Each licensee makes a different form of fire escape. Prior to joining the combination some of the licensees had patents and others had not. The latter class had been making fire escapes not within the patent sued on, without molestation or payment of royalty, and they are still making the same styles as before, but paying license fees to complainant. The licenses were made without consideration except immunity to the licensees from competition and unjust prosecution, and the opportunity of joining others in suppressing competition and raising prices. Prior to complainant's organization, the fire escapes, both patented and non-patented, were in competition which is now suppressed. It is alleged, as a conclusion from the facts thus stated, that complainant is an unlawful combination under the Sherman Act (act July 2, 1390, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), all its acts and contracts in furtherance of the scheme are void—

"and that any and all title to property of any nature acquired by or under any such contract or agreement in furtherance and in aid of such illegal acts, is also absolutely void and of no effect; that the alleged assignment of the patent herein sued on to the complainant was in furtherance of and in aid of accomplishing said illegal combination; that said assignment and this suit against this defendant, and suits against others similarly situated, are each steps in one and the same fraudulent and illegal scheme, the one being dependent upon the other for its success, to control the prices of fire escapes, to suppress competition, and to compel this defendant and other manufacturers of fire escapes who are not in said combination, to yield to the [297] demands of the complainant to that effect, or to drive them out of the business of manufacturing and selling fire escapes, to the manifest injury of the public and contrary to public policy under the law; that said assignment is, therefore, illegal, void and of no force and effect to transfer title of said patent to the complainant herein; and that the complainant therefore has no title in the patent sued on, and no title or right of any kind sufficient to found this suit upon."

By the great weight of Federal authority, the infringer of a patent cannot justify his acts by attacking complainant as a trust or unlawful combination. This is simply saying, "You're another." Complainant may be an obnoxious combination, but that does not excuse defendant for appropriating its property. Such a doctrine would justify steal-

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ing stolen goods from the thief, or despoiling any real or supposed trust of all its holdings. *Strait v. National Harrow Co.* (C. C.) 51 Fed. 819; *Edison El. Lt. Co. v. Sawyer-Man El. Co.*, 53 Fed. 592, 3 C. C. A. 605; *Otis Elevator Co. v. Geiger* (C. C.) 107 Fed. 131. In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, Connolly bought pipe and gave notes for it, upon which the suit was brought, alleging that he ought not to pay the notes because the pipe company was an unlawful trust, and that the sale for which the notes were given was made in the ordinary business of the trust. He also claimed treble damages under the Sherman Act. The court say:

"The defense cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he had bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe."

The Connolly case was an action at law, while this is in equity, and it is urged that a court of equity will not lend its aid to an illegal trust even to the extent of protecting its property rights. In other words, that an unlawful combination may be freely despoiled of its property without equitable relief, even if it can sue at law. No such distinction is made in the Connolly case, and the Circuit Court of Appeals of this circuit held a like defense unavailing against creditors' claims presented in an equity case, in *Dennehy v. McNulta*, 86 Fed. 825, 30 C. C. A. 426, 41 L. R. A. 609, certiorari denied 176 U. S. 683, 20 Sup. Ct. 1026, 44 L. Ed. 638. The claims in question were for rebates made by a corporation which had been held an unlawful monopoly by the Illinois Supreme Court, and were disallowed on another ground. Moreover, the claims were based upon the contracts themselves, so the question was directly raised, and not collaterally, as in the case now

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under consideration. The Dennehy decision was approved in the *Connolly case*, 184 U. S. 547, 22 Sup. Ct. 431, 46 L. Ed. 679. The latter case is also authority for the position that the Sherman Act does not avoid contracts made by an illegal combination unless themselves in restraint of interstate commerce.

[298] The question of the validity of contracts of sale by an unlawful trust, made in furtherance of the combination, was examined at length in *Con. Wall Paper Co. v. Voight*, 212 U. S. 227, 256, 29 Sup. Ct. 280, 53 L. Ed. 486, and such a sale held void in a suit brought on the contract. The *Connolly case* was distinguished on the ground that the sale there was not a part of, nor in execution of, any general plan or scheme condemned by the law. It was simply the case of a corporation selling its own goods to a stranger wishing to buy them. But in the *Voight case* the sale was based upon agreements which were essential parts of an illegal scheme; the vendee having made a purchasing agreement by which sales were unlawfully restricted. Judgment for the corporation would have given effect to an illegal combination.

It is, however, argued that, even though a trespasser cannot defend his act by showing that his adversary is guilty of *malum prohibitum*, yet patent infringement suits stand on a somewhat different ground. A person bringing an infringement suit must show title to the patent, while the mere possessor of tangible property, though without title, may sue for trespass. Therefore, it is said, it is always open to defendant in an infringement suit to attack plaintiff's title. If he relies on an assignment, defendant may show its invalidity. A transfer, it is further argued, made in aid of unlawful combination, is absolutely void, passing no title of any kind. So the conclusion is reached that in any and all patent infringement suits defendant may raise the question of trust or no trust, good or bad trust, reasonable or unreasonable restraint of trade, whenever there was a patent transfer in aid of the combination. The United States Steel Corporation, for instance, is the owner by assignment of hundreds of patents. In all its infringement suits may defendants raise the question now

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in litigation by the Government whether it is or is not within the Sherman Act? The question would seem to suggest the answer, to the effect that an infringement suit may be disposed of without touching the question of trust or combination, and that the court, in adjudging infringement, would not thereby approve a possible illegal combination. A patent transfer is valid to pass title, even though made pursuant to unlawful combination. A fraudulent sale is still a sale, good until set aside, and can be attacked only by some one injured. Neither grantor nor grantee may question it. It is voidable as to those intended to be injured, but good as to all others. This rule has been often recognized by the Supreme Court in ejectment and various other cases. *Luhrs v. Hancock*, 181 U. S. 567, 573, 21 Sup. Ct. 726, 45 L. Ed. 1005; *Milwaukee & M. R. Co. v. Soutter*, 13 Wall. 517, 523, 20 L. Ed. 543. "A person does not become an outlaw and lose all rights by doing an illegal act." Mr. Justice Holmes, in *Nat. Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 Sup. Ct. 512, 47 L. Ed. 879. "A man by committing a fraud does not become an outlaw and caput lupinum." *Stoffela v. Nugent*, 217 U. S. 499, 30 Sup. Ct. 600, 54 L. Ed. 856. Even though the sole inducement and consideration for the patent transfer were the expected benefits to be realized from the trust, yet this does not avoid it. "In most cases the result complained of as springing from a tort is a contract, the contract is lawful, and [299] the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud." *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241.

The sole value of patent property resides in monopoly. Within certain limits this monopoly may be made to extend to non-patentable property, as just decided by the Supreme Court in *Henry v. Dick*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, 176 O. G. 751. If the patentee attempts still further to extend his monopoly by occupying unpatented territory, and thus brings himself within the civil and criminal provisions of the Sherman Act, he is amenable under that statute, but his property rights secured by the patent remain. He is not to be indirectly punished in an infringement suit for his breach of an independent statute.

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By the amendment now under consideration, it is sought to bring the patent transfer within the Voight case through the allegation that it was an essential part of the combination. If, in making a decree for infringement or in dismissing for want of it, it were necessary to give effect to an illegal trust, the Voight case would apply. But a decree adjudging infringement would not do this. It would establish title in complainant and infringement by defendant, and this without touching the question of illegal combination. That question the court is not compelled to decide. If a suit were brought directly upon the patent transfer, and the defense that it was an essential part of an unlawful trust were raised, then the court would be obliged to consider that question. The transfer could not in that event be upheld without sustaining also the trust, if one really existed. Not so here. No one is before the court who has any title or standing to raise the question of trust or no trust, because the patent transfer is valid whether or not any unlawful combination in reality exists.

A somewhat analogous case is where the owner of property, or a claim to property, enters into a champertous agreement with his attorney, the latter agreeing to pay the expense of litigation on condition of sharing in the recovery. For a court to entertain the suit will inevitably give effect to the champertous contract, yet that is no reason for dismissal. The plaintiff's title or claim does not come through the unlawful bargain; hence he is free to proceed. *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388; *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991.

The exceptions to the substituted amendment of the answer are sustained.

SIMON ET AL v. AMERICAN TOBACCO CO. ET AL.

(Circuit Court. S. D. New York. December 8, 1911. On Rehearing, January 2, 1912.)

[192 Fed. Rep., 662.]

CRIMINAL LAW (§ 42)—IMMUNITY—VERIFICATION OF PLEADINGS.—Act Cong. June 30, 1906, c. 3920, 34 Stat. 798 (U. S. Comp. St. Supp. 1909, p. 1168), providing that immunity shall extend only to a

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person who, in obedience to a subpoena, gives testimony under oath, or produces evidence, documentary or otherwise, under oath, does not apply to a person verifying a pleading, so that neither a corporation nor an individual has any immunity in doing so.*

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.]
CORPORATIONS (§ 517)—PLEADINGS—VERIFICATION.—Code Civ. Proc. N. Y. § 525, subd. 1, requires the answer of a domestic corporation to be verified by one of its officers, and section 523 declares that the verification may be omitted where the party pleading would be privileged to testify as a witness concerning an allegation denied in the pleading. *Held*, that while an officer of a corporation may decline to verify its answer in an action at law in a Federal court sitting in New York, where the New York law relating to verification of pleadings must be followed, on the ground that his doing so would tend to incriminate him, the fact that one or all of the corporation's officers would be incriminated if they verified the pleading and were given no immunity did not relieve the corporation from the duty to verify its answer, since, under such circumstances, it was its duty to select or provide an officer to do so, who would not be incriminated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2047-2051; Dec. Dig. § 517.]

[663] **WITNESSES (§ 306)—PRIVILEGE—SELF - INCRIMINATION.**—The privilege against self-incrimination is personal to a witness and cannot be availed of by a corporation, to justify withholding its books, correspondence, and accounts, or closing the mouths of its servants and agents as witnesses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1058-1060; Dec. Dig. § 306.]

At Law. Action by Louis Simon and others against the American Tobacco Company and others. On motion to compel plaintiff to accept an unverified answer. Denied.

Samuel J. Rawak, for plaintiff.

Nicoll, Anable, Lindsay & Fuller, for defendant American Tobacco Co.

Goldsmith, Cohen, Cole & Weiss, for defendant Metropolitan Tobacco Co.

WARD, Circuit Judge.

This is an action at law under section 7 of the Sherman Anti-Trust Law (act July 2, 1890, c. 647, 26 Stat. 210 [U. S.

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Comp. St. 1901, p. 3202]) to recover treble damages against two domestic corporations, defendants. The complaint is verified, and, the defendants having served unverified answers, the plaintiff returned them on the ground that they were not verified by an officer, as required by section 525, subd. 1, of the Code of Civil Procedure of the State of New York. The defendants now move that the plaintiff be compelled to accept the answers.

Section 523 of the Code of Civil Procedure provides that the verification may be omitted "where the party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading." In an action in the Federal courts the immunity which deprives a witness of the privilege of not incriminating himself must be given by the Federal law. *Jack v. Kansas*, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234.

[1] Congress in the act of June 30, 1906, has provided that:

"Immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under oath or produces evidence, documentary or otherwise, under oath." U. S. Comp. St. Supp. 1909, p. 1168.

This does not seem to apply to a person verifying a pleading (*U. S. v. Sanitary Mfg. Co.* [D. C.] 187 Fed. 229), so that neither a corporation nor an individual has any immunity if it does so.

[2] The law of New York requiring the answer of a domestic corporation to be verified by one of its officers must be followed in the Federal courts in actions at law. *St. Louis Railway Co. v. Knight*, 122 U. S. 79, 96, 7 Sup. Ct. 1132, 30 L. Ed. 1077. Doubtless an officer of a corporation may decline to verify the company's answer in an action at law in this court on the ground that his doing so would tend to incriminate him. But the fact that one or all of the officers of the company would be incriminated if they verified the answer and are given no immunity will not relieve it of the requirement that its answer must be verified. It must select an officer to do so who [664] will not be incriminated, and if there is no such officer must provide one.

The practice does prevail in the State courts of New York to serve unverified answers of corporations in libel cases,

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though the complaint is verified. There are but two decisions on the subject, and they are at special term, one in 1888, *Goff v. Star Printing Co.*, 21 Abb. N. C. 211, and *Batterman v. Journal Co.*, 28 Misc. Rep. 375, 59 N. Y. Supp. 965, in 1899. This practice enables the corporation to deny as matter of pleading, and so to compel the plaintiff to prove, what it might have to admit if its answer were verified.

[8] But the Supreme Court of the United States, in *Hale v. Henkel*, 201 U. S. 43, 70, 74, 26 Sup. Ct. 370, 50 L. Ed. 652, and *Wilson v. United States*, 221 U. S. 361, 382-384, 31 Sup. Ct. 538, 55 L. Ed. 771, has held that the privilege against self-incrimination is personal to a witness and cannot be availed of by a corporation so as to withhold its books, correspondence, and accounts or to close the mouths of its servants and agents as witnesses. Obviously, if corporations could do this, they would be enabled entirely to defeat investigations under the interstate commerce act and the Sherman Anti-Trust Law.

The motion is denied.

On rehearing.

A rehearing of the motion to compel the defendants to serve a verified answer has been granted at their urgent solicitation. I will consider first certain criticisms upon the opinion heretofore handed down before reconsidering it on the merits.

It is intimated by defendants that the court's suggestion that a corporation which has no officer who can verify its answer without tending to incriminate himself, and who is willing to do so, should elect one who can is immoral. Why? It can hardly be assumed that a corporation in such case (which, indeed, is very hard to imagine) ought to submit to a judgment by default if it has a defense. On the contrary, it would seem to be clearly its duty to elect an officer who can verify its answer without incriminating himself.

Next, they say that such an officer would be a dummy, elected to deceive the court and evade the law. I assume exactly the contrary, namely, that such an officer is elected because he can verify without incriminating himself, and

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that the corporation will not ask him to verify a false answer, and, that if it does, he will refuse to do so.

Another criticism made is that the by-laws of the corporation may not enable it to fill a vacancy. There may be such a corporation, but I will not make my decision depend upon such an assumption.

Reconsidering the decision on its merits, the custom stated in the defendants' affidavits that unverified answers of corporations in libel suits are accepted by practitioners in New York City depends upon the decision made at special term in 1888 in the case of *Goff v. Star Printing Co.*, 21 Abb. N. C. 211. This case is not binding even on any court of the State of New York, and of course is not binding on the Federal courts, which follow only the decisions of the highest State tribunals in construing State statutes. What I am bound to follow under section 914, U. S. Rev. Stat. (U. S. Comp. St. 1901, [665] p. 684), in this case, is the provision of section 523 of the Code of Civil Procedure that:

"Where a pleading is verified, each subsequent pleading, except a demurrer, on the general answer of an infant by his guardian ad litem, must also be verified."

This, it may be said in passing, is a wise and beneficial requirement, intended to bring out the truth of every controversy in the very first statement; allegations of the complaint not denied being admitted.

The next two provisions involve substantive law. They are:

"But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading. A pleading cannot be used, in a criminal prosecution against the party, as proof of a fact admitted or alleged therein."

As to the extent of the privilege against incrimination and the extent of immunity conferred upon witnesses, I am bound to follow the fifth amendment to the Constitution of the United States, the acts of February 25, 1903, 32 Stat. L. 908 (U. S. Comp. St. Supp. 1903, p. 1142), and June 30, 1906, 34 Stat. L. 798, and the decisions of the Court of Appeals of this circuit and of the Supreme Court of the United States.

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The laws of the State of New York confer no sufficient immunity upon witnesses in respect to testimony which may incriminate them and the laws of the United States conferring immunity to persons testifying in connection with the interstate commerce law and Anti-Trust Law does not extend to the verification of pleadings.

The decision in the Goff case, *supra*, seems to me either to hold that corporations are entitled to the privilege against self-incrimination or to extend the personal privilege of an officer of a corporation to the corporation itself, most likely the former, as it permits the corporation to serve an unverified answer without any proof whatever that none of its officers can verify the answer without incriminating or tending to incriminate himself.

On the other hand, the decisions of the Supreme Court of the United States are directly to the contrary. *Hale v. Henkel*, 201 U. S. 43, 70, 78, 26 Sup. Ct. 370, 50 L. Ed. 652, a case arising under the Anti-Trust Law, and *Wilson v. United States*, 221 U. S. 361, 382 to 388, 31 Sup. Ct. 538, 55 L. Ed. 771, a criminal case, if I understand them, hold distinctly that a corporation has no privilege against self-incrimination under the fifth amendment to the Constitution, and that its officers and employees cannot set up their personal privilege for its benefit. This being what the defendants are trying to accomplish in this case, the motion is denied.

UNITED STATES v. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

No. 386. Argued October 20, 23, 1911.—Decided April 22, 1912.

[224 U. S. 533.]

Whether the unification of terminals in a railroad center is a permissible facility in aid of interstate commerce, or an illegal combination in restraint thereof, depends upon the intent to be in-

* For prior opinions (148 Fed. 486), see vol. 3, page 34; (154 Fed. 268), see vol. 3, page 265. For later opinions (197 Fed. 446), see *post*, page 501; (226 U. S. 420), see *post*, page 507; (236 U. S. 194), see *post*, page 512.

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ferred from the extent of the control secured over the instrumentalities which such commerce is compelled to use, the method by which such control has been obtained, and the manner in which it is exercised.*

The unification of substantially every terminal facility by which the traffic of St. Louis is served is a combination in restraint of interstate [§84] trade within the meaning and purposes of the Anti-Trust Act of July 2, 1890, as the same has been construed by this court in *Standard Oil Co. v. United States*, 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 166.

The history of the unification of the railroad terminal systems in St. Louis in the Terminal Railroad Association shows an intent to destroy the independent existence of the terminal systems previously existing, to close the door to competition, and to prevent the joint use or control of the terminals by any non-proprietary company.

A provision in agreement for joint use of terminals by non-proprietary companies on equal terms does not render an illegal combination legal where there is no provision by which the non-proprietary companies can enforce their right to such use.

Although the proprietary companies of a combination unifying terminals may not use their full power to impede free competition by outside companies, the control may so result in methods inconsistent with freedom of competition as to render it an illegal restraint under the Sherman Act.

This court bases its conclusion that the unification of the terminals in St. Louis is an illegal restraint on interstate traffic, and not an aid thereto, largely upon the extraordinary situation at St. Louis and upon the physical and topographical conditions of the locality.

A combination of terminal facilities, which is an illegal restraint of trade by reason of the exclusion of non-proprietary companies, may be modified by the court by permitting such non-proprietary companies to avail of the facilities on equal terms.

In this case held that the practices of the Terminal Association in not only absorbing other railroad corporations, but in doing a transportation business other than supplying terminal facilities operated to the disadvantage of interstate commerce.

One of the fundamental purposes of the Anti-Trust Act is to protect, and not to destroy, the rights of property; and, in applying the remedy, injury to the public by the prevention of the restraint is the foundation of the prohibitions of the statute. *Standard Oil Co. v. United States*, 221 U. S. 1, 78.

Where the illegality of the combination grows out of administrative conditions which may be eliminated, an inhibition of the obnoxious

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practices may vindicate the statute, and where public advantages of a unified system can be preserved, that method may be adopted by the court.

In this case the objects of the Anti-Trust Act are best attained by a decree directing the defendants to reorganize the contracts unifying [885] the terminal facilities of St. Louis under their control so as to permit the proper and equal use thereof by non-proprietary companies, and abolishing the obnoxious practices in regard to transportation of merchandise.

Unless defendants, whose combination has been declared illegal by reason of administrative abuse, modify it to the satisfaction of the court so as to eliminate such abuse in the future, the court will direct a complete disjoinder of the elements of the combination and enjoin the defendants from exercising any joint control thereover.

(56 L. ed. 810.)*

[MONOPOLY—COMBINATION OF TERMINAL SYSTEMS.—1. The mere combining of several independent railway terminal systems into one does not necessarily operate as a forbidden restraint, under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), upon the interstate commerce which must use them.

(For other cases, see Monopoly II, c, in Digest Sup. Ct. 1908.)

MONOPOLY—COMBINATION OF TERMINAL SYSTEMS.—2. The combination and unification of the terminal facilities at St. Louis under the exclusive ownership and control of less than all the railway companies under compulsion to use them—the inherent conditions being such as to prohibit any other reasonable means of railway access to that city—violates the provisions of the Sherman Anti-Trust Act of July 2, 1890, §§ 1, 2, in that it constitutes a contract or combination in restraint of commerce among the States, and an attempt to monopolize such commerce which must pass through the gateway at St. Louis.

(For other cases, see Monopoly II, c, in Digest Sup. Ct. 1908.)

MONOPOLY—COMBINATION OF TERMINAL SYSTEMS—EXTENT OF RELIEF.—3. Adequate relief from a combination of terminal facilities which offends against the provisions of the Sherman Anti-Trust Act of July 2, 1890, §§ 1, 2, because it places such facilities under the exclusive ownership and control of less than all the railroad companies under compulsion, from the peculiar local topographical conditions, to use them, will be afforded by a decree

* The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 56, page 810, Lawyers Edition, Supreme Court Reports. Copyrighted, 1911, 1912, by The Lawyers Co-operative Publishing Company.

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requiring the reorganization of the combination so that it will act as the impartial agent of every railway line which must use the terminal instrumentalities.

(For other cases, see Monopoly II, c, in Digest Sup. Ct. 1906.)]

The facts, which involve the validity under the Sherman Anti-Trust Act of the Terminal Railroad Association of St. Louis, are stated in the opinion.

Mr. E. O. Crow, Special Assistant to the Attorney General, with whom *The Attorney General* and *Mr. Charles A. Houts*, United States Attorney, were on the brief, for appellant:

The record shows a plain violation of the Sherman Act of July 2, 1890.

Every contract, combination in the form of trust or otherwise, or conspiracy, in undue restraint of trade or commerce among the several States or foreign nations, is illegal. See § 1.

Monopolizing, or attempting, combining or conspiring to monopolize interstate or foreign trade or commerce is illegal. See § 2.

Certain fundamental considerations control. The statute is aimed at restrictions upon interstate commerce. Given a reasonable construction, as it must receive, its purpose is to permit commerce between the States and with foreign nations to flow in its natural channels unrestricted by any combinations, contracts, conspiracies, or monopolies whatsoever. *Hopkins v. United States*, 171 U. S. 586; *Loewe v. Lawlor*, 208 U. S. 274.

Combinations between competing railroads engaged in interstate commerce to unduly restrain commerce and combinations between *media* or instruments of interstate [386] commerce fall within the prohibition of the act. *United States v. Trans-Missouri Freight Association*, 166 U. S. 319; *United States v. Joint Traffic Association*, 171 U. S. 505; *Addyston Pipe & Co. v. United States*, 175 U. S. 244; *Northern Securities Co. v. United States*, 193 U. S. 197; *Anderson v. United States*, 171 U. S. 604; *Standard Oil Co. v. United States*, 221 U. S. 1.

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To monopolize interstate commerce, or the *media*, or instruments of interstate commerce, is to secure, or adopt measures which may bring about an exclusive control of such commerce or of such instruments of commerce so as to prevent others from engaging therein, or using such instruments of commerce. *In re Green*, 52 Fed. Rep. 115; *Northern Securities Co. v. United States*, 193 U. S. 197, 402; *United States v. American Tobacco Co.*, 164 Fed. Rep. 700; *United States v. Knight*, 156 U. S. 1.

It is not necessary to bring a combination within the act, that the result of its operation shall be complete restraint or monopoly, or that it shall have resulted in actual injury to the public. It is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. *United States v. Chesapeake & Co. Fuel Co.*, 115 Fed. Rep. 610; *United States v. E. O. Knight Co.*, 156 U. S. 16; *Northern Securities Co. v. United States*, 193 U. S. 197; *Chattanooga & Co. Works v. Atlanta*, 203 U. S. 390.

The Terminal Association is necessarily engaged in interstate commerce. *United States v. Union Stock Yards*, 161 Fed. Rep. 919; *United States v. Colorado & Co. R. R.*, 157 Fed. Rep. 321; *United States v. R. P. T. Co.*, 144 Fed. Rep. 861.

Mr. H. S. Priest, with whom *Mr. T. M. Pierce* was on the brief, for appellees:

The terminal service necessary to be done in a great city may, any or all of it, be done by the railroad companies for themselves. A company may build its own line connecting with another road on the other side of the city, and it may use its own wagons to receive and deliver freight at store doors.

This, and no more, the railroad companies of St. Louis have done. They have acquired the terminal facilities of St. Louis for themselves and are operating them as a part of the instrumentalities of their business. That each one might do this if the instrumentalities employed were its own is conceded, but it is denied that they may combine with each other for that purpose.

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The unitary system is in accord with public policy.¹

Terminal service is a matter of internal economy which the companies may adjust to mutual advantage and no arrangement respecting it operates to restrict competition between them as to the transportation service for the public in which they are engaged.

Whatever facility railroad companies may use in common they may own in common. Common arrangements affecting internal economy have never been held to be in violation of public policy and whenever, in the advance of civilization, they have suggested themselves as feasible, they have been recognized by law, and appropriate regulations have been prescribed for them. In the country every man builds independently. In the crowded section of a great city, however, if all construction were done independently, the waste in space and the increase in cost of construction would be very great.

Community of use of terminals in a large city is more than a matter of convenience, or economy; it is an absolute public necessity.

Under the Interstate Commerce Law, and indeed under the common law of the land, tolls must be reasonable, and the Government has the power to make them so if they are not. The charges of extortion and that the proprietary railroad companies compel all other railroad companies to [388] use the facilities are not true. There is, indeed, a compulsion, but it is inherent in the situation. The other companies use the terminal property because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive.

Every consideration of a public nature points to a consolidation of the terminals and to a common use of them by all the railroad companies coming into the city. But to avoid the odious phases of a monopoly, this use must be open to all upon equal terms. The charge for service in any case can be stated in one word—cost. No money received for the service rendered goes to any other purpose than paying expenses of operation, taxes, fixed charges, and proper maintenance. No dividends are paid

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upon terminal shares, and no proprietary railroad company is a beneficiary of fixed charges. Any new railroad built into St. Louis now has but to secure a way to a terminal track and it has at once the advantages of the entire terminal system.

The public policy of the country as indicated by statutory enactments has been in favor of combination by railroad companies whenever any common matter of internal economy is involved, and also where the combination is in the nature of connecting lines of railroad for the purposes of continuous transportation. Two bridges across a great river, where one will serve, do not facilitate commerce, but burden it with an unnecessary charge.

Common use of the same facilities by different railroad companies has not only been approved, but has been enforced whenever there has been good reason therefor. Act of March 3, 1875, 18 Stat. 510; §§ 1164, 1165, Rev. Stat. Missouri; Union Depot acts of the State of Illinois; April 7, 1875; of Alabama; of February 15, 1907, of Indiana; Burns' Ann. Stat., Col. 2, §§ 5345, 5374; of Iowa, §§ 2099 to 2102, Annotated Code of 1897; of Maine, 60, 51, Rev. Stat. 1903; and of Michigan, Chap. [889] 166, Comp. Laws, 1897; of Minnesota, act of March 5, 1879; of Nebraska, Chap. 20, Laws of 1887, § 1816, Comp. Stat. 1901; of Ohio, Chap. 8, Tit. 2, 2 Bates' Ann. Stat.; of South Carolina, Code of 1902, vol. 1, 813; of Tennessee, §§ 2429 to 2437, Code of 1896; of Texas, Chap. 16a, Civil Stat. 1897; of Virginia, § 1294, Code 1904. See acts of Congress relating to Union Station in Washington, D. C.

It would be singular indeed, if all of the States severally, and the United States as well, were giving their sanction to arrangements and agreements which are in violation of the Sherman Act, and it is much more probable that a construction of that act leading to such a result is entirely without warrant.

Union terminals have been frequently before the courts for consideration, and have always been recognized and approved as legitimate agencies in the work of railroad transportation. *State v. Terminal R. R. Assn.*, 189 Missouri,

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284; *Bernard v. Cheeseman*, 7 Colorado, 376; *Central Railroad Company v. Perry*, 58 Georgia, 461; *Birdwell v. Gate City Terminal Co.* (Ga.), 10 L. R. A. (N. S.) 909; *Indianapolis Union Railway Co. v. Cooper*, 6 Ind. App. 202; *Reisner v. Strong*, 24 Kansas, 410; *State v. Martin*, 51 Kansas, 462; *Mayor v. Norwich R. R. Co.*, 109 Massachusetts, 103; *Mayor v. Railroad Commissioners*, 113 Massachusetts, 161; *Union Depot Co. v. Morton*, 83 Michigan, 265; *Detroit Station v. Detroit*, 88 Michigan, 347; *State v. St. Paul Union Depot Co.*, 42 Minnesota, 142; *St. Paul Union Depot Co. v. M. & N. R. Co.*, 47 Minnesota, 154; *Chicago, St. Paul & Kansas C. Ry. Co. v. Union Depot Ry Co.*, 54 Minnesota, 411; *Dewey v. Railroad*, 142 N. Car. 392; *Riley v. Union Station Co.*, 71 S. Car., 457; *Ryan v. Terminal Co.*, 102 Tennessee, 124; *Collier v. Union Railway Co.*, 113 Tennessee, 96; *Joy v. St. Louis*, 138 U. S. 1; *C., R. I. & P. Ry. Co. v. U. P. Ry. Co.*, 47 Fed. Rep. 15; *S. C.*, 51 Fed. Rep. 309, and 163 U. S. 564.

[390] The arrangement in question is not in restraint of trade or commerce among the several States, or a monopoly of any part of the trade or commerce among the several States.

Counsel for the Government confuse the operation of the railroad and the cost of it, with the service rendered to the public and the charge for it. The Sherman Act has nothing to do with the former; its restrictions fall altogether upon the latter. No matter how many subordinate agencies of transportation different railroad companies employ in common, no matter how many combinations they may make to secure economy in operation, so long as they do not pool their business or their earnings, so long as they are left free in their relations to the shipping and traveling public, every motive of self-interest remains to incite to competition. And when economy of operation, however accomplished, reduces costs, the end hoped for, through competition, commerce is aided, and charges are reduced to a still lower level.

Mr. John C. Higdon, by leave of the court, filed a brief as *amicus curiæ*.

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Mr. Justice LURRON delivered the opinion of the court.

The United States filed this bill to enforce the provisions of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, against thirty-eight corporate and individual defendants named in the margin,* as a combination in restraint of interstate commerce and as a monopoly forbidden by that law. The cause was heard by the four circuit judges, who, being equally divided in judgment, dismissed the bill without filing an opinion. From this decree the United States has appealed.

The principal defendant is the Terminal Railroad Association of St. Louis, hereinafter designated as the Terminal Company. It is a corporation of the State of Missouri, and was organized under an agreement made in 1889 between Mr. Jay Gould and a number of the defendant railroad companies for the express purpose of acquiring the properties of several independent terminal companies at St. Louis with a view to combining and operating them as a unitary system.

The terminal properties first acquired and combined into one system by the Terminal Company comprised the following: The Union Railway & Transit Company of St. Louis and East St. Louis; the Terminal Railroad of St.

* The Terminal Railroad Association of St. Louis; The St. Louis Merchants' Bridge Terminal Railway Company; The Wiggins Ferry Company; The St. Louis Bridge Company; The St. Louis Merchants' Bridge Company; The Missouri, Kansas & Texas Railway Company; The St. Louis & San Francisco Railway Company; The Chicago & Alton Railway Company; The Baltimore & Ohio Southwestern Railroad Company; The Illinois Central Railroad Company; The St. Louis, Iron Mountain & Southern Railway Company; The Chicago, Burlington & Quincy Railway Company; The St. Louis, Vandalia & Terre Haute Railroad Company; The Wabash Railroad Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Louisville & Nashville Railroad Company; The Southern Railway Company; The Chicago, Rock Island & Pacific Railway Company; The Missouri Pacific Railway Company; the Central Trust Company of New York; A. A. Allen, S. M. Felton, A. J. Davidson, W. M. Green, J. T. Harahan, C. S. Clarke, H. Miller, Benjamin McKean, Joseph Ramsey, George E. Evans, C. E. Schaaf, T. O. Powell, J. F. Stevens, A. G. Cochran, W. S. McChesney, Julius Walsh, V. W. Fisher, and S. D. Webster.

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Louis and East St. Louis; The Union Depot Company of St. Louis; The St. Louis Bridge Company; and the Tunnel Railroad of St. Louis. These properties included the great union station, the only existing railroad bridge—the Eads or St. Louis Bridge—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the river. For a time this combination was operated in com[392]petition with the terminal system of the Wiggins Ferry Company, and upon the completion of the Merchants' Bridge, in competition with it, and a system of terminals which were organized in connection with it. The Wiggins Ferry Company had for many years operated car transfer boats by means of which cars were transferred between St. Louis and East St. Louis.

Upon each side of the river it owned extensive railway terminal facilities, with which connection was maintained with the many railroads terminating on the west and east sides of the river, which gave such roads connection with each other, as well as access to many of the industrial and business districts on each side. In 1890 a third terminal system was opened up by the completion of a second railroad bridge over the Mississippi River at St. Louis, known as the Merchants' Bridge. This was a railroad toll bridge, open to every railroad upon equal terms. That it might forever maintain the potentiality of competition as a railroad bridge, the act of Congress authorizing its construction provided that no stockholders in any other railway bridge company should become a stockholder therein. But as this was a mere bridge company, it was essential that railroad companies desiring to use it should have railway connections with it on each side of the river. For this purpose two or more railway companies were organized and lines of railway were constructed connecting each end of the Merchants' Bridge with various railroad systems terminating on either side of the river. The Merchants' Bridge and its allied terminals were thereby able to afford many, if not all, of the railroads coming into St. Louis, access to the business districts on both sides of the river, and connection with each other.

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Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis: First, the original Wiggins Ferry Company, and [393] its railway terminal connections; second, The Eads Railroad Bridge and the several terminal companies by means of which railroads terminating at St. Louis were able to use that bridge and connect with one another, constituting the system controlled by the Terminal Company, and, third, The Merchants' Bridge and terminal facilities owned and operated by companies in connection therewith.

This resulted in some cases in an unnecessary duplication of facilities, but it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service. Important as were the considerations mentioned, their independence of one another served to keep open the means for the entrance of new lines to the city, and was an obstacle to united opposition from existing lines. The importance of this will be more clearly seen when we come to consider the topographical conditions of the situation.

That the promoters of the Terminal Company designed to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, is manifested by the declarations of the original agreement, as well as by the successive steps which followed. Thus, the proviso in the act of Congress authorizing the construction of the Merchants' Bridge, which forbade the ownership of its stock by any other bridge company or stockholder in any such company, was eliminated by an act of Congress, and shortly thereafter the Terminal Company obtained stock control of the Merchants' Bridge Company, and of its related terminal companies, and likewise a lease.

The Wiggins Ferry Company owned the river front on the Illinois shore opposite St. Louis for a distance of several miles. It had on that side and on its own property, switching yards and other terminal facilities. From these yards extended lines of rails which connected with its car transfer

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boats and with the termini of railroads on the Illinois side. [394] On the St. Louis side of the river it had like facilities by which it was in connection with railway lines terminating on that side. That company was, consequently, able to interchange traffic between the systems on opposite sides of the river and to serve many industries. In 1892 the Rock Island Railroad Company endeavored to obtain an independent entrance to the city. For this purpose it sought to acquire the facilities owned by the Wiggins Ferry Company by securing a control of its capital stock. This was not deemed desirable by the railroad companies which jointly owned the Terminal Company's facilities, and to prevent this acquisition effort was made to secure control of the stock. The competition was fierce and the market price of the shares pushed to an abnormal price. The final result being in doubt, an agreement was reached by which the Rock Island Company was admitted to joint ownership with the other proprietary companies in all of the terminal properties which were operated by the Terminal Company or which should be acquired by it. The shares in the Ferry Company bought by the Rock Island were transferred to the Terminal Company at cost and were paid for by that company. These shares, united with those which had been acquired by the Terminal Company, enabled the latter to absorb the properties of the Ferry Company, and thus the three independent terminal systems were combined into a single system.

We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the Anti-Trust Act?

It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable [395]able restraint forbidden by the act of Congress, as construed and applied by this court in the cases of *The Standard Oil Com-*

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pany v. The United States, 221 U. S. 1, and *The United States v. American Tobacco Company*, 221 U. S. 106, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted.

The consequence to interstate commerce of this combination can not be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. Though twenty-four lines of railway converge at St. Louis, not one of them passes through. About one-half of these lines have their termini on the Illinois side of the river. The others, coming from the west and north, have their termini either in the city or on its northern edge. To the river the city owes its origin, and for a century and more its river commerce was predominant. It is now the great obstacle to connection between the termini of lines on opposite sides of the river and any entry into the city by eastern lines. The cost of construction and maintenance of railroad bridges over so great a river makes it impracticable for every road desiring to enter or pass through the city to have its own bridge. The obvious solution is the maintenance of toll bridges open to the use of any and all lines upon identical terms. And so the commercial interests of St. Louis sought to solve the question, the system of car ferry transfer being inadequate to the growing demands of an ever-increasing population. The first bridge, called the Eads Bridge, was, and is, a toll bridge. Any carrier may use it on equal terms. But to use it there must be access over rails connecting the bridge and the railway. On the St. Louis side the bridge terminates at the foot of the great hills upon which the city is built; on the Illinois side it [396] ends in the low and wide valley of the Mississippi. This condition resulted in the organization of independent companies which undertook to connect the bridge on each side with the various railroad termini. On the Missouri side it was necessary to tunnel the hills, that the valley of Mill Creek might be reached, where the roads from the west had their termini. Thus, though

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the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge, the Merchants' Bridge. This, too, was, and is, a toll bridge, and may be used by all upon equal terms. To prevent its control by the Eads Bridge Company, it was carefully provided that no stockholder in any other bridge company should own its shares. But this Merchants' Bridge, like the Eads Bridge, had no rail connections with any of the existing railroad systems, and these facilities, as in the case of the Eads Bridge, were supplied by a number of independent railway companies who undertook to fill in the gaps between the bridge ends and the termini of railroads on both sides of the river. It must be also observed that these terminal companies were in many instances so supplied with switch connections as not only to connect with the bridge, but also served to connect such roads with each other and with the industries along their lines. Now, it is evident that these lines connecting railroad termini with the railroad bridges dominated the situation. They stood, as it were, just outside the gateway, and none could enter, though the gate stood open, who did not comply with their terms. The topographical situation making access to the city difficult does not end with the river. The city lies upon a group of great hills which hug the river closely and rapidly recede to the west. These hills are penetrated on the west by the narrow valley of Mill Creek, which crosses the city about [397] its center. Railways coming from the west use this valley, but its facilities are very restricted and now quite occupied. North of the city the hills drop back from the river gradually, and there exists a valley formed by the Mississippi and Missouri Rivers. Railroads coming from the north on the west side of the river come by this valley. As we have stated before, the valley of the Mississippi at St. Louis is on the Illinois side of the river. Railroads coming from the east, northeast, and southeast have their termini in that valley. As a consequence, there have grown up numerous

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cities and towns of some consequence as manufacturing places, the chief of which is East St. Louis.

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company. The averment of the bill that the railroad companies, here defendants, being the sole stockholders of the Terminal Company, as we shall later see, compel all other railroad companies converging at St. Louis to use the facilities owned and operated by the Terminal Company, is, therefore, borne out by the facts of the situation. Nor is this effect denied, for the learned counsel representing the proprietary companies, as well as the Terminal Company, say in their filed brief: "There indeed is compulsion, but it is inherent in the situation. The other companies use the terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." Obviously, this was not true before the consolidation of the systems of the Wiggins Ferry Company and the Merchants' Bridge Company with the system theretofore controlled by the Terminal Company. That the non-proprietary companies might have been compelled to use the instrumentalities of one or the other of the three systems then available, and [296] that the advantages secured might not have been so great as those offered by the unified system now operated by the Terminal Company, must be admitted. But that there existed before the three terminal systems were combined a considerable measure of competition for the business of the other companies, and a larger power of competition, is undeniable. That the fourteen proprietary companies did not then have the power they now have to exclude either existing roads not in the combination, or new companies, from acquiring an independent entrance into the city, is also indisputable. The independent existence of these three terminal systems was, therefore, a menace to complete domination as keeping open the way for greater competi-

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tion. Only by their absorption or some equivalent arrangement was it possible to exclude from independent entrance the Rock Island Company, or any other company which might desire its own terminals. To close the door to competition large sums were expended to acquire stock control. For this purpose the obligations of the absorbed companies were assumed and new funds obtained by mortgages upon the unified system.

The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated. If the Terminal Company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. It becomes, therefore, of the utmost importance to know the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between the East and West must depend. The fact that the Terminal Company is not an independent corporation at all is of the utmost significance. There [399] are twenty-four railroads converging at St. Louis. The relation of the Terminal Company is not one of impartiality to each of them. It was organized in 1889, at the instance of six of these railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent, and upon a consideration to be agreed upon. From time to time other companies came to an agreement with the original proprietors until, at the time this bill was filed, the properties unified were held for the joint use of the fourteen companies made defendants. In the contract of 1889, above referred to, the purpose of acquiring the first terminals combined, is declared to be, "that said properties may be held in perpetuity as a unit and developed and improved in the interest of the proprietary companies, for the purpose of furnishing adequate terminal

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facilities in St. Louis and East St. Louis." This purpose was carried out by the conveyance to "each of the proprietary companies * * * forever a right of joint use with each other and such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties * * * now held or that may be hereafter acquired in St. Louis and East St. Louis, * * * it being understood that the right herein granted to each proprietary company is not transferable to any extent whatever, but is to remain as an appurtenant to the railroad now owned by each proprietary company."

That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to which stipulated that other railroad companies not named therein as proprietary companies might only be admitted "to joint use of said terminal system on unanimous consent, but not otherwise, of the [400] directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement," etc. Inasmuch as the directors of the Terminal Company consisted of one representative of each of the proprietary companies, selected by itself, it is plain that each of said companies had and still has a veto upon any joint use or control of terminals by any non-proprietary company.

By that and the supplemental agreement of December, 1902, the Ferry Company and the Merchants' Bridge Company having then been absorbed, the proprietary companies prescribed that the charges of the company shall be so adjusted as to produce no more revenue than shall equal the fixed charges, operating and maintenance expenses. Deficiencies for those purposes the proprietary companies guaranteed to make good, though such payments are to be reimbursed by an increase in charges, if necessary.

We fail to find in either of the contracts referred to any provision abrogating the requirement of unanimous consent to the admission of other companies to the ownership of the Terminal Company, though counsel say that no such company will now find itself excluded from joint use or

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ownership upon application. That other companies are permitted to use the facilities of the Terminal Company upon paying the same charges paid by the proprietary companies seems to be conceded. But there is no provision by which any such privilege is accorded.

By still another clause in the agreement the proprietary companies obligate themselves to forever use the facilities of the Terminal Company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one-third of the railroad mileage of the United States.

In acquiring these properties the Terminal Company has assumed mortgage and stock dividend obligations of [401] the constituent companies aggregating about twenty-five million dollars. It has executed its own mortgage upon all of its property to secure an issue of fifty million dollars of bonds, of which twenty million dollars worth have been sold, and the proceeds used in construction or in paying for the properties acquired. It has thus about forty-five million dollars of mortgage or fixed charges or liabilities. The company has an authorized capital stock of fifty million dollars. Of this about twenty-eight million dollars has been issued in equal proportions to the several owning railroad companies. No dividends have ever been paid, and the company disclaims any purpose to pay dividends. We fail to find any obligation by which they may be prevented from paying dividends upon the stock held by the proprietary companies, or that in its treasury, if ever issued. Undoubtedly the major part of this revenue arises from the business done by the proprietary companies through the Terminal Company, but that coming from other companies is, however, a large contribution. That no direct profit is derived by the owning companies from the operation of the terminals, may be true. But it is not clear that the proprietary companies do not make an indirect profit through ownership of obligations of the absorbed companies.

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous

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traffic which must use the St. Louis gateway, is undeniable. That the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies, may be true. Aside from their power under all of the conditions to exclude independent entrance to the city by any outside company, their control has resulted in certain methods which are not consistent with freedom of competition. To these acts we shall refer later.

We are not unmindful of the essential difference between [402] terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote commerce.

The argument that the combination of the instrumentalities operated by the Terminal Company with those of the Merchants' Bridge Company was a combination of two competing lines of railroad, such as was condemned in *Northern Securities Company v. United States*, 193 U. S. 197, is not well founded. This combination if properly regarded as of parallel and competing lines would have been obnoxious to the seventeenth section of the constitution of Missouri. For the purpose of enforcing this Missouri prohibition, the State instituted a proceeding to dissolve the combination of the properties of the Merchants' Bridge Terminal Railroad Company with the Terminal Railroad Association of St. Louis, upon the ground that the railroads operated by those companies were parallel and competing lines of railroad. Relief was denied. The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reasonable mean-

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ing of the statutes forbidding combinations between competing or parallel lines of railroad. Referring to the legitimate use of terminal companies, the Missouri court said:

"A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would result in compelling the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff.

"St. Louis is a city of great magnitude in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk line railroads converge in this city. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. Suppose it were required of every railroad company to effect its entrance to this city as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots, and switch yards scattered all over the vast area and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all incoming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden." 182 Missouri, 284, 299.

Among the cases in which the public utility of such companies has been recognized are: *Bridwell v. Gate City Terminal Co.* (Georgia), 10 L. R. A. (N. S.) 909; *Indianapolis Union Railroad Company v. Cooper*, 6 Ind. App. 202; *State ex rel. v. Martin*, 51 Kansas, 462; *Mayor v. Norwich E. W. Railroad Co.*, 109 Massachusetts, 103; *Union Depot Company v. Morton*, 83 Michigan, 265; *State v. St. Paul Union Depot Co.*, 42 Minnesota, 142; *Ryan v. Terminal Co.*, 102 Tennessee, 111, 124.

[404] While, therefore, the mere combining of several independent terminal systems into one may not operate as a restraint upon the interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman Act. The one in question, counsel say, is not antagonistic to but

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in harmony with the Anti-Trust Act, "because it expands competition by extending equal conveniences and advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis; expedites and economizes the service." It is justified, they argue by "(1) the physical or topographical conditions peculiar to the locality; by (2) its commercial, industrial, and railroad development and history; by (3) public opinion expressed legislatively and judicially, and (4) by the judgment of experienced railroad engineers and managers." From which consideration the same counsel say that the issue presented by this record is, "whether the common control or ownership of all the terminal facilities (mechanical devices for the exchange, receipt, and distribution of traffic) of a large commercial and manufacturing center by all of the railroad companies, and for the benefit of all upon equal terms and facilities, without discrimination, is condemned by the Sherman Act."

Let us analyze the proposition included in the issue, as stated by counsel, quoted above: Counsel assume that the combined terminals have come under a "common control or ownership." But this is not the case. That the instrumentalities so combined are not jointly owned or managed by all of the companies compelled to use them is a significant fact which must be taken into account for the purpose of determining whether there has been a violation of the Anti-Trust Act. The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies are [405] under compulsion to use the terminal system, and yet have no voice in its control.

It can not be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But

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the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The "physical or topographical condition peculiar to the locality," which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities. The witness upon whom the defendants chiefly rely to uphold the advantages of the unified system which has been constructed, Mr. Albert L. Perkins, gives this as his unqualified judgment. He was and is an experienced railroad engineer and manager and is the railway expert of the Municipal Bridge and Terminal Board, a commission appointed under a city ordinance, headed by the mayor, to study and report legislation needed to relieve the terminal conditions of St. Louis. From his study of the local situation he expresses the opinion that the terminals of railway lines in any large city should be unified as far as possible, and that such unification may be of the greatest public utility and of immeasurable advantage to commerce, state and interstate. Neither does he find in the conditions at St. Louis any insurmountable objection to such unification. The witness, however, points out that such a terminal company should be the agent of every [406] company, and, furthermore, that its service should not be for profit or gain. In short, that every railroad using the service should be a joint owner and equally interested in the control and management. This, he thinks, will serve the greatest possible economy, and will give the most efficient service without discrimination. When thus jointly owned and controlled, whether through the medium of a mere holding or operating company, such as the Terminal Company is, or by other means, the facilities would belong to each relatively to its own business, and delivery would be made by each company over its own tracks to connecting lines or places of destination in the city. The charge for the haul thus lengthened would then be properly

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absorbed by the through rate, leaving nothing to be added to that to be charged the shipper or consignee but switching and storage charges proper.

The terminal properties in question are not so controlled and managed, in view of the inherent local conditions, as to escape condemnation as a restraint upon commerce. They are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies.

There are certain practices of this Terminal Company which operate to the disadvantage of the commerce which must cross the river at St. Louis, and of non-proprietary railroad lines compelled to use its facilities. One of them grows out of the fact that the Terminal Company is a terminal company and something more. It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads and to assistance in the collecting and distributing of traffic for the carrier companies. It, as well as several of the absorbed [407] terminal companies, were organized under ordinary railroad charters. If the combination which has occurred is to escape condemnation as a combination of parallel and competing railroad companies, it is because of the essential difference between railroad and terminal companies proper—differences pointed out by the Missouri Supreme Court in the case heretofore referred to. Indeed, the defense to this proceeding is based upon the insistence that the Terminal Company is solely engaged in operating terminal facilities, defined in the briefs, "as mechanical devices for the exchange, receipt, and distribution of traffic." This Terminal Company, in addition to its schedule for terminal charges proper, such as switching, warehousing, etc., files its rate sheets for the transportation of every class of merchandise from the termini of the railroads on the Illinois side of the river to destinations across the river

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over its lines. These rates are applied to all traffic destined to cross the river, with certain exceptions to which we shall later refer, which originates within an irregular area of which St. Louis is the center, and having a diameter of from one to two hundred miles. This arbitrary operates to cast a burden upon short hauls, which has led to much complaint, as being both discriminatory and extortionate. An exception is made as to traffic originating within so much of this area as constitutes what is called "Green Line Territory," or which is destined to points within "Green Line Territory." This seems to be based upon competitive conditions caused by the great toll railway bridge at Memphis, Tennessee, the bridge toll being treated by lines using the bridge as a part of the through rate.

Another exception to the rule imposing this arbitrary is that it does not apply to traffic which originates in East St. Louis, whether it is destined to cross the river or not. The reason for this exemption, where such traffic does cross the river, is not apparent. Possibly, it may be said [408] that it is because the traffic of St. Louis and East St. Louis should be treated as arising in the same commercial area. But this reason does not seem to apply to the traffic originating in St. Louis, which is bound east, though that of East St. Louis is altogether free from this arbitrary charge. The effect of this arbitrary discrimination is obviously injurious to the commerce and manufacturers of St. Louis, and is among the chief causes of complaint against the Terminal Company. Mr. Perkins, to whom we have before referred as a capable and impartial expert, says of the consequence of this curious exception out of the one hundred mile area rule, that "the effect of these charges was, of course, to put the man doing business in St. Louis at a disadvantage to that extent with the man doing business at East St. Louis on his eastern business." Again, he says that the practical operation was to give East St. Louis a distinct advantage in the manufacturing lines. Another practice which marks this Terminal Company as a transportation company which interposed itself between railroads having

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their termini on opposite sides of the river, and between the city itself and the roads terminating on the east side of the river, is that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, is billed only to East St. Louis, and there rebilled to destination.

The practice of rebilling and of making a distinct hauling charge is an evident survival of the methods which existed when the eastern lines had no termini in St. Louis. They then billed to East St. Louis, and there turned the traffic over to one of the existing terminal companies, who made their own specific charges for the haul to places of delivery within the city. The practice has been continued after the reason for it has disappeared. The effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within [409] one hundred miles of the city, destined to cross the river, seems to have been also applied to the large coal traffic between the Illinois coal mines, upon which the city is largely dependent.

We come now to the remedy. In determining what this should be we, as said by this court in *Standard Oil Company v. United States*, 221 U. S. 1, 78, must not overlook the fact that in applying a remedy "that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of com-

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merce among the States and an attempt to monopolize commerce among the States which must pass through the gateway at St. Louis.

The Government has urged a dissolution of the combination between the Terminal Company, the Merchants' Bridge Terminal Company, and the Wiggins Ferry Company. That remedy may be necessary unless one equally adequate can be applied.

But the illegal restraint upon commerce among the States which we here find to exist consists in the possession acquired by the proprietary companies through the [410] means and with the object we have stated of dominating commerce among the States carried on by other railroads entering or seeking to enter the city of St. Louis and by which such railroads are compelled either to desist from carrying on interstate commerce or to do so upon the terms imposed by the proprietary companies. This control and possession constitutes such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize.

The power resulting from the combination even before completed by the acquisition of the Wiggins Ferry Company and its related terminals was exhibited when the Rock Island sought an independent entrance.

Some of its abuses are shown by the imposition of the arbitrary hauling charge imposed upon the artificially limited trade districts described. It is shown also by the maintenance of the system of billing traffic destined to cross the river at St. Louis, either east or west, or to St. Louis, if from points on the east side of the river, a practice so galling and universal as to practically "eliminate St. Louis from the railroad map," to quote the graphic, if extravagant, language of counsel for the United States; as respects the great traffic subject to the regulation.

Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have

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pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Company and the proprietary companies as shall constitute the former the *bona fide* agent and servant of every railroad line which [411] shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.

These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged and the case is remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Company, which we have pointed out as bringing the combination within the inhibition of the statute.

First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junc-

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tion points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or [412] so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called one hundred mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user as herein provided for and the Terminal or proprietary companies which shall arise after a final decree in this cause, may be submitted to the district court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission.

Upon failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties upon a plan for the dissolution of the combination between the Terminal Company, the Wiggins Ferry Company, the Merchants' Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decrees for the complete disjoinder of the three systems, and their future operation as independent systems, as may be necessary, enjoining the defendants, singly and collectively, from any exercise of control or dominion over either of the said terminal systems or their related constituent companies, through lease, purchase, or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future [413] combina-

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tion of the said systems in evasion of such decree or any part thereof.

Reversed and remanded accordingly.

Mr. Justice HOLMES took no part in the hearing or determination of this case.

UNITED STATES *v.* TERMINAL ASS'N OF ST.
LOUIS ET AL.*

(District Court, E. D. Missouri, E. D. July 8, 1912.)

[197 Fed. Rep., 446.]

COURTS (§ 101)—FEDERAL COURTS—POWER OF SINGLE JUDGE—"HEARING."—Where the Supreme Court reversed a decree dismissing a suit to enforce Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and remanded the case with specific directions, the decree on the mandate may be entered by any district judge presiding, or circuit judge assigned to the court, under Judicial Code (act March 3, 1911, c. 231, 36 Stat. 1089 [U. S. Comp. St. Supp. 1911, p. 183]) § 18, notwithstanding Expedition Act Feb. 11, 1908, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1911, p. 1883), requiring the assignment for the hearing of actions involving the Anti-Trust Act before not less than three judges; the word "hearing" meaning a trial requiring judicial determination.^b

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344-350; Dec. Dig. § 101.

For other definitions, see Words and Phrases, vol. 4, pp. 8236-8238.]

JUDGMENT (§ 504)—VALIDITY—COLLATERAL ATTACK.—A decree entered by a single judge in conformity to the mandate of the Supreme Court reversing a decree dismissing a suit to enforce Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and [447] remanding the case with specific directions, is not void nor subject to collateral attack, even if there was error in holding that a single judge could enter the decree notwithstanding Expedition Act Feb. 11, 1908, c. 544, 32 Stat. 823 (U. S.

* For prior opinions (148 Fed. 486), see vol. 3, page 34; (154 Fed. 268), see vol. 3, page 265; (224 U. S. 883) see *ante*, page 473. For later opinions (228 U. S. 420) see *post*, page 507; (236 U. S. 194) see *post*, page 512.

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Comp. St. Supp. 1911, p. 1383), requiring the assignment for hearing of such actions before not less than three judges.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 944-947; Dec. Dig. § 504.]

Action by the United States against the Terminal Association of St. Louis and others. There was a decree of the Supreme Court reversing a decree dismissing the bill and remanding the case for a decree. Heard in the trial court after remand on question of right of a single judge to direct decree.

Edward C. Crow, of St. Louis, Mo., for complainant.

Henry S. Priest, of St. Louis, Mo., for defendants.

TRIEBER, district judge:

This is an action by the United States to enforce the provisions of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), instituted in the circuit court for this district before the enactment of the new Judicial Code. After the original bill had been filed, the Attorney General of the United States filed a certificate under Expedition Act February 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1911, p. 1383), and the hearing was before the four circuit judges of this circuit. By a divided court the bill was dismissed, and upon appeal the decree of dismissal was reversed by the Supreme Court on April 22, 1912 (224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810), and the cause remanded to this court with the usual directions "to proceed in conformity with the opinion and directions of this court as according to right and justice and the laws of the United States ought to be had."

[1] It has now been suggested by the Attorney General that, as a certificate under the Expedition Act was filed when the action was originally instituted, the decree on the mandate could not be entered by a single judge, but only by at least three circuit judges, in conformity with the Expedition Act above referred to.

Assuming, without deciding, that the Judicial Code does not repeal the Expedition Act, the question to be determined is whether in a case in which the Supreme Court has directed

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the trial court to enter a final decree in conformity with specific directions that decree can only be entered when the bench of the district court is occupied by at least three circuit judges because a certificate of expedition had been filed in the trial court when the suit was originally instituted.

The act of Congress is as follows:

"That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, 'An act to regulate commerce,' approved February 4, 1887, or any other acts of a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general importance, a copy of which shall be immediately furnished by such clerk to [448] each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select."

The opinion of the Supreme Court not only reversed and remanded the case, but by reference thereto it will be found that it gives specific and minute directions what decree is to be entered. The opinion says:

"These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged, and the case is remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within 90 days after receipt of mandate, a plan for the reorganization of the contract between the 14 defendant railroad companies and the terminal companies, which we have pointed out as being the combination within the inhibition of the statute."

The court then enumerates in seven distinct and separate sections what this new agreement must be, and then proceeds that, upon failure to come to such an agreement, permanent injunctions be issued, and the combination dissolved.

The expedition act provides that upon filing of the certificate by the Attorney General two things be done: First, that such case shall be given precedence over others and in every way expedited; and, second, that it be assigned for hearing at the earliest practicable day before not less than three of the circuit judges of the circuit. What is meant

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by the word "hearing"? As ordinarily used in an equity cause, it clearly means a trial or a disposition of some matter arising in the case which requires judicial determination by the court, whether interlocutory or final. In *Miller v. Tobin* (C. C.), 18 Fed. 609, 616, Judge Deady defined it as "an equity term, and is properly applied to the argument and consideration of a case at the several stages of its orderly progress, but when applied to that upon which the case is absolutely determined—disposed of—it is qualified by the word 'final.'"

In *Akerly v. Vilas*, 24 Wis. 171, 1 Am. Rep. 166, the court said:

"The word 'hearing' has an established meaning as applicable to equity cases. It means the same thing in those cases that the word 'trial' does in cases of law, and the words 'final hearing' have long been used to designate the trial of an equity case upon the merits as distinguished from the hearing of any preliminary questions arising in the cause, and which are termed interlocutory."

Other cases to the same effect are *Carpenter v. Winn*, 221 U. S. 533, 31 Sup. Ct. 683, 55 L. Ed. 842; *Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760, 57 C. C. A. 64; *Taylor v. Breese*, 163 Fed. 678, 90 C. C. A. 558; *Root v. Mills*, 168 Fed. 688, 94 C. C. A. 174; *Babcock v. Wolf*, 70 Iowa, 676, 28 N. W. 490; *Glennon v. Britton*, 155 Ill. 232, 40 N. E. 594.

A careful reading of the entire act shows clearly that the intention of Congress, in addition to expediting the hearing of the cases enumerated, was to have them, owing to their great importance, tried by at least three judges, instead of one, as had been the usual practice [449] in the circuit court since the enactment of the Evarts Act (act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, p. 438]), creating the United States Circuit Courts of Appeal. But the directions contained in the mandate of the Supreme Court in this cause leave nothing for determination by or to the discretion of the judge of this court. He is specifically directed to enter a certain decree, and in entering that decree he is, in effect, performing a ministerial duty which may be enforced by mandamus. In *re Washington, etc., R. R. Co.*, 140 U. S. 91, 11 Sup. Ct. 673, 35 L. Ed. 339; *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed.

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432; *Sanford Fork & Tool Co., Petitioners*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *In re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994.

In the first case cited above, the court, in granting the mandamus against the judge of the Circuit Court, said:

"It was the duty of the court below to have entered the judgment strictly in accordance with the judgment of this court, and the language of the mandate, 'that such execution or proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding,' did not authorize the court to depart in any respect from the judgment of this court."

In *Gaines v. Rugg*, where a mandamus was also awarded against the circuit judge, the court, after reviewing its former decisions, said:

"In the present case, as we have observed, there was no discretion to be exercised by the circuit judge; and, although it might have been admissible to raise the question by a new appeal to a proper court, yet, in view of the delay to be caused thereby, we do not consider that such a remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper."

In *Sanford Fork & Tool Co.* it was held:

"When a case has been once decided by this court on appeal and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court can not vary it, or examine it for any other purpose than execution, or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it further than to settle so much as has been remanded. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled either upon a new appeal or by writ of mandamus to execute the mandate of this court."

In view of these decisions, it can not be successfully maintained that the proceeding now before the court is a "hearing" within the meaning of the Expedition Act. All this court is now called upon to do is to determine whether the new agreement of the parties, when presented to the court, is in compliance with the directions of the mandate, and, if it is, to enter the decree as directed, or, if the new agree-

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ment does not comply with the conditions prescribed by the Supreme Court, to enter a decree dissolving the combination held to be unlawful by the Supreme Court and grant a permanent injunction. *United States v. American Tobacco Co.* (C. C.) 191 Fed. 371, is not in point. In that case the decree was entered in the Circuit Court prior to the time the new Judicial Code went into effect. At that time all the circuit [450] judges, as well as the associate justice of the Supreme Court allotted to that circuit, and the district judge of that district, or any one of them, were authorized to sit at the trial or hearing of any cause pending in the Circuit Court. Nor was the mandate of the Supreme Court in that case as specific and minute as to what decree should be entered as in the case at bar. The directions in that case were, "We leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property," thus vesting the Circuit Court with discretion not granted in this cause by the Supreme Court.

[2] It has also been suggested by the Attorney General that, if this court should erroneously hold that it has the right to enter the decree in this cause, such decree would be absolutely void, meaning thereby that the decree would be subject to collateral attack for want of jurisdiction. That this contention is erroneous it is only necessary to refer to *In re Metropolitan Trust Co.*, 218 U. S. 312, 31 Sup. Ct. 18, 54 L. Ed. 1051.

In the opinion of the court the decree directed to be entered by the mandate of the Supreme Court can be entered by any district judge presiding, or the circuit judge assigned to this court, under the provisions of section 18 of the Judicial Code.

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EX PARTE UNITED STATES, PETITIONER.*

PETITION FOR WRIT OF PROHIBITION.

No. 10, Original. Submitted December 16, 1912.—Decided January 6, 1913.

[226 U. S., 420.]

Unless the repeal be express or the implication to that end be irresistible, a general law does not repeal a special statutory provision affording a remedy for specific cases. *Petri v. Creelman Lumber Co.*, 199 U. S. 487.^b

The special provisions of the Expedition Act of February 11, 1903, 32 Stat. 823, c. 544, requiring in a particular class of cases the organization of a court constituted in a particular manner, were not repealed by the Judicial Code of 1911.

The new district court created by the Judicial Code of 1911 is the successor of the formerly existing circuit court, and as such is vested with the duty of hearing and disposing of cases under the expedition act of 1903, § 291.

Section 291 of the Judicial Code of 1911 expressly confers powers of the circuit court upon the now existing district courts.

Under the Expedition Act of 1903 a court composed as required by that act may be organized at the request of the United States to consider the plan to carry out the decree of this court holding a combination unlawful under the Sherman Anti-Trust Act.

In this case the district judge having refused to organize a court under the Expedition Act to determine the form and decree to be entered under the mandate of this court, this court issues its writ of prohibition directed to the district judge against entering a decree.

The facts, which involve the construction of the Expedition Act of 1903 and the question of whether certain provisions of the Judicial Code of 1911 conflict therewith, are stated in the opinion.

The Attorney General and Mr. Edward C. Crow, Special Assistant to the Attorney General, for petitioner.

Mr. Henry S. Priest for the respondent.

* For prior opinions (148 Fed. 486) see vol. 3, page 84; (154 Fed. 268) see vol. 3, page 285; (197 Fed. 446) see *ante*, page 501; (224 U. S. 383) see *ante*, page 473. For later opinion (236 U. S. 194) see *post*, page 512.

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[421] Mr. Chief Justice WHITE delivered the opinion of the court.

The matter before us concerns the execution of the decree in *United States v. Terminal Railroad Association of St. Louis*, 224, U. S. 383. That case, which involved violations of the Sherman Anti-Trust Act, was commenced in the Circuit Court of the United States for the Eastern District of Missouri, was there decided by four circuit judges in consequence of the filing by the Attorney General of the United States of the certificate provided for by the act of February 11, 1903, commonly known as the Expedition Act, c. 544, 32 Stat. 823. While the case was here pending, the Judicial Code of March 3, 1911, 36 Stat. 1087, c. 231, was adopted, and hence our mandate was directed to the District Court of the United States for the Eastern District of Missouri, the successor of the circuit court.

Upon the filing of the mandate in that court, the judge of the district court being disqualified, District Judge Trieber, of the District Court of Arkansas, was assigned to sit in the cause. Disagreement between the parties having arisen as to what plan of reorganization should be adopted to carry out the mandate of this court, and the court below having expressed its intention to adopt by a final decree a plan to which the Government did not assent, objection was made by the United States to proceeding further, upon the ground thus stated by the court below in its opinion

"* * * as a certificate under the Expedition Act was filed when the action was originally instituted, the decree on the mandate could not be entered by a single judge, but only by at least three circuit judges, in conformity with the Expedition Act above referred to."

The suggestion having been overruled by a formal order and fruitless effort having been made to induce action [422] by the senior circuit judge who was also the senior circuit judge who had participated in the original decision of the cause, the interposition of this court by the proceeding before us was invoked. The judge below evidently only desirous of being informed as to his duty, after leave to file the application for prohibition was here granted, has submitted the issue on the opinion of the court below and upon

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printed argument for both parties, as if on a return to a rule to show cause why the writ should not issue.

In refusing to apply the Expedition Act the court below, "assuming without deciding that the Judicial Code does not repeal the Expedition Act," based its refusal upon the ground that the proceeding to enforce the mandate of this court was not within the intendment of the Expedition Act because not a matter requiring the hearing contemplated by that act. This view was maintained by conclusions as to the general nature of the duty to give effect to a decree already rendered and by considerations based upon the opinion that the decree of this court was so specific as to leave no room for discussion and therefore to afford no occasion for organizing a tribunal constituted in accordance with the requirements of the Expedition Act. In the printed argument, however, upon which the matter has been here submitted, the action of the court is sought to be sustained upon a much broader ground, viz, that as by the Judicial Code the Circuit Courts were abolished, it has become no longer possible to organize a court in accordance with the Expedition Act, because that act by implication has been repealed by the Judicial Code. Thus, after commenting upon the provisions of the Judicial Code, it is said:

"The Judicial Code (sec. 1, Chap. I) provides for a district judge for each District Court.

"There is no provision for the exercise of any judicial authority by any circuit judge, except by special appointment, pursuant to the provisions of sec. 18, Chap. I, of [428] the Code. He then derives his power from such appointment and from no other source. As circuit judges they have no authority in the enforcement of the jurisdiction of the District Courts.

"After devolving upon the District Courts the jurisdiction formerly possessed by the abolished Circuit Courts, the Code (Chap. VI) creates a Circuit Court of Appeals, and provides (sec. 117):

"There shall be in each circuit a Circuit Court of Appeals which shall consist of three judges, * * * which shall be a court of record with appellate jurisdiction as hereinafter limited and established."

"It must be conceded, in view of this legislation, if this suit was now instituted, it could only be heard by a district judge unless some circuit judge should be appointed under the provisions of sec. 18, Chap. I, to discharge the functions of a district judge and the case be brought before him in that capacity."

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But the contention is faulty, because although the premise upon which it rests be conceded, the deduction drawn from it is unwarranted. It is, of course, undoubted that Chap. XIII of the Judicial Code, while not interfering with the tenure of office of the circuit judges, abolished the Circuit Courts. It is also undoubted that by that act the District Courts provided for were made the successors of both the Circuit and District Courts which had theretofore existed and were in a general sense endowed with the jurisdiction and power theretofore vested in such prior courts. It is, moreover, beyond question that the statute, while contemplating as a general rule the holding of District Courts by district judges and as a general rule for holding Circuit Courts of Appeal by circuit judges, nevertheless expressly directs when the occasion requires (§ 18) the assignment by the senior judge, or the circuit justice, or the Chief Justice, of a circuit judge to hold a District Court, and endows a judge so assigned with all [424] the authority of a district judge (§ 19), giving power in case of such designation to hold separately at the same time a District Court in such district, and to discharge all the judicial duties of the district judge therein (§ 14). The statute therefore clearly gives to the circuit judges the rights and powers of judges of the new District Courts, and calls such powers into play when assigned according to law.

The question, therefore, reduces itself to this: Were the special provisions of the Expedition Act requiring in a particular class of cases the organization of a court constituted in a particular manner repealed by the Judicial Code? This is the only question, because if that act was not repealed by the Code, then its provisions amount to an assignment by operation of law of the circuit judges to sit as judges of the District Court for the purpose of discharging the duties imposed by the act. When the issue is thus narrowed solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be

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express or the implication to that end be irresistible. *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 497. That the new District Court created by the Judicial Code was vested with the duty of hearing and disposing of the cases provided for in the Expedition Act as the successor of the formerly existing Circuit Court, as we have already stated, is undoubted. The mere fact that the Expedition Act in terms refers to the organization of a Circuit Court would be, as a general rule, under the circumstances, of no importance, and becomes absolutely without significance in view of the express provision of Chap. XIII, § 291, of the Judicial Code, saying:

"Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, [425] upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts."

The Expedition Act being therefore still in force and its provisions being applicable to the District Courts which the Judicial Code created, we think the court below erred in concluding that the United States was not entitled to a District Court organized in the mode pointed out in the Expedition Act unless it be, as stated by the lower court in its opinion, the subject in hand was of such a character as not to be within the scope of the Expedition Act. Coming to consider that question without going into any elaboration, we are of opinion that error was committed in so holding. While it is true that the mandate of this court gave certain specific directions as to the scope and character of the decree to be entered, it afforded an opportunity to the defendants to submit a plan in order to carry out the decree and gave to the United States an opportunity to be heard in opposition to that plan, and left to the court a serious and important duty to be discharged in any event and especially in case of controversy on the subject. These considerations, we think, brought the subject within the scope of the Expedition Act and justified the request of the United States that the case be considered and a decree entered by a court composed as provided in that act.

Writ of prohibition to issue.

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UNITED STATES *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS.*• TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS *v.* UNITED STATES.EVENS & HOWARD FIRE BRICK COMPANY,
PETITIONER.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI. PETITION FOR LEAVE TO INTERVENE.

Nos. 452, 572.—Original. Argued October 20, 1914. Petition submitted October 18, 1914.—Decided February 23, 1915.

[236 U. S., 194.]

Even though persons seeking to intervene on the settlement of a decree were not parties and therefore can not intervene in the court below, they may be entitled to be heard in this court concerning the decree in so far as it may operate prejudicially to their rights.^b

Where both parties have appealed, one from the decree entered on the mandate of this court and the other from denial of a motion to [195] modify such decree, as the whole decree is before this court the dismissal of the latter appeal would not limit its power and duty to pass on the question raised by it; the proper practice is to consolidate the appeals.

The decision and mandate of this court in regard to a combination declared illegal under the Anti-Trust Act should not be interpreted as safeguarding one public interest by destroying another, or as making the movement of transportation freer in some channels by obstructing its flow in others.

The decision of this court in 224 U. S. 383, explained, and the decree entered by the court below on the mandate modified so as to recognize the right of the Terminal Company as an accessory to its strictly terminal business to carry on business exclusively originating on its lines, exclusively moving thereon, and exclusively intended for delivery on the same.

* For prior opinions (148 Fed. 486) see vol. 3, page 34; (154 Fed. 268) see vol. 3, page 265; (224 U. S. 383) see *ante*, page 473; (197 Fed. 446) see *ante*, page 501; (226 U. S. 420) see *ante*, page 507.

^b Syllabus copyrighted, 1915, by The Banks Law Publishing Company.

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The facts, which involve the construction of the mandate and decision in *United States v. St. Louis Terminal Association* as reported in 224 U. S. 383, and the effect to be given to such mandate and the further directions of this court in regard thereto, are stated in the opinion.

Mr. Edward C. Crow for the United States.

Mr. H. S. Priest and *Mr. T. M. Pierce* for St. Louis Terminal.

Mr. George M. Block, with whom *Mr. John F. Lee* was on the brief, for intervenors.

Mr. Chief Justice WHITE delivered the opinion of the court.

This case was decided April 22, 1912 (224 U. S. 383), and the question now is, Was due effect given to the mandate of this court? A clear understanding will come by the merest outline of some of the legal proceedings preceding and following that decision. The decree which was reversed was entered by a circuit court composed of four judges, in accordance with the Expedition Act. The circuit courts having been abolished when the decision of this court was rendered, the mandate was directed to the appropriate district court. There the United States filed the mandate and asked an interlocutory decree giving the time fixed by this court to take the steps which were decided to be necessary to make the organization of the defendants a legal one under the Anti-Trust Act. The defendants presented a statement of what was proposed by them to be done in compliance with the decree of this court to accomplish the result stated, and over some objection on the part of the United States an interlocutory decree was entered which in many respects accepted as sufficient what was proposed to be done by the defendants. On the taking of those steps and after a full hearing of the parties the court announced its purpose to enter a final decree not following in some respects a proposed

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form of final decree suggested by the United States. Thereupon the United States by petition for prohibition filed in this court asserted the entire want of jurisdiction in the court as constituted to entertain the enforcement of the mandate, as that could only be done by a court composed like the one which had rendered the judgment, that is, one composed under the Expedition Act. The prohibition was granted (226 U. S. 420), and jurisdiction to enforce the mandate was assumed by a court of three circuit judges sitting in the district court in pursuance of the Expedition Act. In that court after a hearing as to a proposed interlocutory decree and as the result of steps taken by the defendants to comply with the decision of this court which were deemed sufficient for that purpose, a final decree was entered on March 2, 1914. This decree was objected to by the United States because of the insufficiency, at least in form, of the steps taken by the defendants for the purpose of complying with the decree of this court and of the failure by the court below to insert in the decree various clauses suggested by the United [197] States and which it was insisted were necessary to give effect to the mandate of this court. For these reasons the United States on March 27, 1914, appealed, and such appeal is now before us and constitutes No. 452, referred to in the caption.

The day after this appeal (March 28) the defendants moved to modify the decree by striking out the first paragraph on two grounds: First, because it referred to the Terminal Company as illegally organized in violation of the Anti-Trust Act, although under the supervision and approval of the court such steps had been taken as were directed by this court to remove all objection to the organization of the company. Second, because the restrictions imposed on the business which the Terminal Company might lawfully do, were susceptible of being construed as forbidding the company to carry on as ancillary to its strictly terminal work a transportation business originating upon one part of its line and destined exclusively to other points on such line. And the necessity of not pro-

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hibiting the company from doing such work, the petition to modify asserted, was shown by the fact that "on account of the necessary extent of its tracks, covering an area of seventy-five to one hundred square miles, it is frequently called upon to take traffic from one point on its line to another point on its line, completing the entire movement on its own tracks." In addition the petition to modify alleged as follows:

"As an illustration: The Terminal Association operates in the early morning and late in the afternoon some trains to transport laborers engaged in industrial factories from Granite City, Illinois, to the different stations on its line in St. Louis, Missouri. This it is prohibited from doing under the decree.

"Another illustration: Many factories are located upon the Terminal Association's tracks on both sides of the Mississippi River. Under this order the defendant, Ter- [196] minal Association, would be restrained from accepting either raw material or finished products shipped from one such factory to another, although it could, with great convenience to the public, render such service."

At about the same date petitions to be allowed to intervene were filed on behalf of the Evens & Howard Fire Brick Company, Union Sand & Material Company, and fifty-three others, all based upon the ground that the petitioners would suffer great injury by the serious loss occasioned to their business or the destruction thereof which would arise from forbidding the Terminal Company to engage in transportation moving exclusively from one point on its line to another point on its line. Some of these petitions alleged that the raw material was prepared at one point and the manufactured product made by using the raw material at another, and that consequently an impossibility of continuing business would result from the inability to transport from one place to another. All these petitions prayed a modification of the order so as to make it clear that it did not forbid the Terminal Company as an incident to its purely terminal business to carry on the business in question. On June 20 the petition of the Terminal Company to modify and the petitions of the various parties to be allowed to intervene and praying a modification came on for hearing, the United States opposing the allowance of all. In support of its petition affidavits were filed by the Terminal Company show-

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ing the movement of many thousands of cars annually in the business referred to and giving the names of very many of those concerned in the movement. The prayer of the Terminal Company for a modification was refused without passing on its merits, the court expressly holding that it had no jurisdiction to do so, as the previous appeal taken by the United States from the final decree had transferred the case to this court. The petitions of intervention of the other parties over the objection of the United States [199] were permitted to be filed, but after filing, the prayer to modify was also in each of said cases denied on the ground that the court was without jurisdiction because of the appeal taken by the United States. From this decree all the defendants to the original suit appealed, and the record referred to in the caption as No. 572 is the one embracing such appeal.

In this court the Evans & Howard Fire Brick Company and the Union Sand & Material Company have filed a petition praying leave to be allowed here to intervene to ask a modification of the decree so as to make it clear that it does not forbid the Terminal Company from engaging as an incident to its terminal business in transportation movements beginning and terminating exclusively on its own lines, the prayer being supported by statements concerning the situation and the alleged injury which would be suffered by prohibiting such business as set out in the petitions to intervene and modify filed in the court below.

The challenge by the United States of the right to hear the intervening petitioners is without merit, since, even although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree in so far as it might operate prejudicially to their rights.

A motion made by the United States to dismiss the appeal taken by the defendants in No. 572 is also without merit. The duty of the court below was but to execute the mandate of this court, and every controversy between the parties concerning the discharge by the court below of its duty was open for this court to examine either originally,

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if essential, or as the result of an appeal by one of the parties, or by way of assertions of right made by the other party as an appellee even in the absence of a cross appeal—a result inevitably arising from the fact that both parties, so far as the settlement of the decree [200] of this court was concerned, were in this court and endowed with the capacity to invoke its action for the proper shaping and execution of the decree, either by original proceeding or in any other appropriate form. *Perkins v. Fourniquet*, 14 How. 328; *Re Sanford Fork & Tool Co.*, 160 U. S. 247; *In re Potts*, 166 U. S. 263. As under these conditions the dismissal of the appeal would in no way limit the power and duty to pass upon the questions raised on the appeal, we think the motion to dismiss ought not to prevail, and that the better practice is to consolidate the appeal of the defendants in No. 572 with the appeal taken by the United States in No. 452 and treat the cases as one for the purposes of settling the questions raised by both parties. In doing this we shall also dispose of the contentions arising on the petition of intervention, since the right to modify the decree which the intervenors assert is precisely coterminous with the claim made by the defendants to modify. In saying this we do not overlook a contention of the defendants with which the intervenors are not concerned as to error committed in qualifying the defendants as an illegal combination, although by complying with the requirements exacted by the decision of this court they were no longer subject to be so qualified. But we treat that subject as not in controversy, because we are of the opinion that the contention concerning it rests upon a wholly unwarranted criticism of a mere form of expression in the decree, unwarranted because on its face the decree unmistakably demonstrates the contention to be absolutely devoid of all merit.

The errors of which the United States complains are stated in ten propositions, but if consideration of the subject embraced in the ninth be postponed to be disposed of in connection with the complaint of the defendants as to the right to a modification of the first paragraph of the

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decree because of the influence which the reasoning applicable to the one will have on the other, we think every [201] possible contention embraced in the assignments may be briefly disposed of by a few general considerations common to them all.

To afford an opportunity for the making of the necessary agreements and contracts curing the vices which the decisions of this court found to exist in the organization of the Terminal Company and to the end that when so made clean the company might continue its existence and operations subject to the safeguards provided in the opinion of this court, it was commanded by the mandate that the case be "remanded to the District Court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the Terminal Company, which we have pointed out as bringing the combination within the inhibition of the statute"; this being followed by a statement of what was required embraced under seven general headings which are in the margin,* followed by the direction that "Upon [202] fail-

* "First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

"Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

"Third. By eliminating from the present agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

"Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, on to points beyond.

"Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of

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ure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties * * * dissolve the combination. The contention of the United States, which is fundamental in the sense that it is involved in or at least gives color to all the propositions insisted upon, is that the court below should have directly proceeded to apply the sanction stated in the mandate in disregard of all its other directions because the combination had so failed to comply with such other requirements as not to be entitled to the benefits which would have arisen from complying with them and therefore had subjected itself to immediate dissolution as an illegal combination. The premise is that the word "parties" in the mandate embraced not solely the parties to the combination but the parties to the suit and therefore included the United States. From this the argument proceeds that as below neither for the purposes of the interlocutory decree nor in any other step was the United States invited to become [203] one of the parties entering into contracts or agreements for the purpose of curing the defects, therefore there was a disregard of the condition precedent to the right to remove the defects, and the duty to apply the penalty of dissolution automatically arose. But this argument even upon the assumption of ambiguity in the text assumes that this court recognized that there

traffic originating within the so-called one hundred mile area that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

"Sixth. By providing that any disagreement between any company applying to become a joint owner or user as herein provided for and the Terminal or proprietary companies which shall arise after a final decree in this cause, may be submitted to the District Court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

"Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the Terminal Company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission."

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was a right to cure the defects but deprived of all power to do so by subjecting the exercise of the right to a condition wholly beyond the will of the parties to the combination. There is, however, not the slightest ambiguity in the mandate giving support to the consequences deduced from it, as the parties referred to plainly embrace only the parties to the agreement from which the combination resulted and directed them to become parties to the new agreement required to make the combination legal by removing the illegal clauses. That this was the purpose of the decision so plainly results from the opinion and mandate as to leave no room for dispute to the contrary. But if there were any opening for controversy, the meaning of the mandate has been previously so explicitly pointed out in this case as to conclude the question. Thus in passing upon the application for prohibition made by the United States to restrain the conduct of the proceedings to enforce the mandate in a district court presided over by a district judge the nature of the duty involved in enforcing the mandate arose for decision, and it was said:

"While it is true that the mandate of this court gave certain specific directions as to the scope and character of the decree to be entered, if afforded an opportunity to the defendants to submit a plan in order to carry out the decree and gave to the United States an opportunity to be heard in opposition to that plan, and left to the court a serious and important duty to be discharged in any event, and especially in case of controversy on the subject." (228 U. S., *supra*, p. 425.)

[204] The want of foundation for the proposition relied upon disposes of all the assigned errors except the one the consideration of which we previously postponed because they all in a greater or less degree depend upon such proposition, and to the extent that they do not, they are devoid of all merit for the following reasons: (a) Because the interlocutory decree was in strict compliance with the mandate; (b) because the contracts and agreements executed by the parties to remove the causes of illegality and which were approved by the court were adequate for that purpose; (c) because when the conception that the Government was a party upon whom rested the responsibility of

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agreeing to contracts modifying the terms of the combination is put out of view, we are of opinion there is no merit in the contention that certain forms of proposed contracts submitted for approval by the Government should have been sanctioned by the court, as such contracts were wholly unnecessary in view of the sufficiency of those executed by the parties and which were approved; (d) because after a careful scrutiny of the record we are of the opinion that in every material step taken by the court below concerning both the interlocutory and final decree ample opportunity was afforded to all the parties to be heard, careful consideration was evidently given to the matters to be decided, and a full compliance both in form and substance with the mandate resulted from the final decree unless error inheres in the two propositions, urged, one by the defendants and the other by the United States, which we now come to dispose of.

It may not be disputed that the clause of the first paragraph of the decree which is in the margin* pointing [205] out the character of the business which the Terminal

* "1. The Terminal Railroad Association of St. Louis is an unlawful combination contrary to the Anti-Trust Act of July 2, 1890 (26 Stat. 209), when it and the various bridge and terminal companies composing it are operated as railroad transportation companies. The combination may, however, exist and continue as a lawful unification of terminal facilities upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business, such as supplying and operating facilities for the interchange of traffic between railroads and to assist in the collecting and distributing of traffic for the carrier companies, switching, storage, and the like, and modifying its contracts as herein specified.

"An election having been made to continue the combination for terminal purposes, the defendants are therefore perpetually enjoined from in any wise managing or conducting the said Terminal Railroad Association or any of its constituent companies and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same, and from making charges otherwise than for and according to the nature of the services so lawfully authorized to be rendered."

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Company as reorganized was authorized to pursue is susceptible of the construction that the right was excluded to do anything but a terminal business in the narrow sense and therefore did not permit the company to carry on as ancillary to its terminal business a transportation business even although originating and terminating on its lines. This being true, we are of opinion, despite the contentions of the United States to the contrary, that the provision in the decree on that subject did not give proper effect to the mandate of this court and should be qualified so as to recognize the right to do in connection with the terminal business proper such transportation business as originates and terminates on the lines of the Terminal Company for the following reasons: Because not to so decide would lead inevitably to the conclusion that the decision of this court contemplated safeguarding one public interest by destroying another and in effect proposed making the movement of transportation freer in some channels by absolutely obstructing all possibility of its flow in others; and moreover because it assumes that the decision proposed to cure the defects in the organization of the combination which caused it to be in conflict with [206] the Anti-Trust Act by commanding the abstention from the prosecution of business which otherwise under the law there would have been a duty to carry on, thus virtually seeking to remove one cause of illegality in a combination by substituting another. The contention that the Terminal Company and the combination which it embodied was not dissolved and was permitted to continue in business solely because if allowed to continue it would be obliged to confine itself to terminal business in the strict sense and therefore should not be permitted to now do other than purely terminal work rests upon a misapprehension of the conditions. The suit to dissolve was largely defended upon the ground that the combination was formed for terminal purposes and that to combine for the purpose of obtaining facilities of that character was not in conflict with the Anti-Trust Act. In disposing of the case the correctness of this contention in the abstract was conceded but as it was found that the geo-

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graphical situation, the area over which the Terminal Company operated and the business which it carried on, in other words its general environment, took it out of the conceded abstract general rule, it was decided that the combination if it wished to continue in business must execute certain agreements for the benefit of the public modifying the terms under which it was organized. The proposition therefore now is that although the duty to execute agreements arose and its performance was compelled because the Terminal Company was not to be dealt with in the light, abstractly speaking, of a strictly terminal organization, nevertheless upon the execution of the agreements its rights are to be measured upon the contrary assumption. As these considerations in our opinion demonstrate that the decree should be modified by permitting the carrying on by the company as incidental to its terminal business of a transportation business originating exclusively on its own line moving thereon and terminating [207] thereon, a direction to modify the decree in that respect must necessarily follow.

The subject of the ninth assignment of errors, upon which the United States most relies, relates to the fifth clause in the mandate containing a direction for the "abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area."

As the court below on this subject did nothing more than embody in its decree the provision of the mandate, the contention is that error was committed because the decree failed to expound the language of the mandate. Indeed in the argument it was insisted that to properly give effect to the mandate there should have been inserted in the decree an express provision absolutely controlling or regulating for the future charges which the Terminal Company might make. But to have given effect to this view would have caused the decree to be plainly repugnant to the provisions of the act to regulate commerce and contrary to the exercise

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by the State authorities of their power over charges of the Terminal Company in so far as the jurisdiction of such authorities may have extended. The flagrant repugnancy to the act to regulate commerce which would have resulted if the decree as asked had been granted will become more manifest when it is considered that the insistence was, as pointed out by the court below in its opinion, that there should have been a provision in substance so fixing and perpetuating for the future rates on traffic coming into East St. Louis from the zone mentioned in the mandate as to compel the commodities transported to East St. Louis to be carried from there across the river to their point of destination in St. Louis without any transportation charge whatever—a direction which it is apparent would have [206] involved, if given, a disregard not only of all the regulations concerning rates established under the act to regulate commerce, but also, it may be, the prohibitions of that act concerning preference and discrimination. This condition is not escaped by the suggestion that such limitations if imposed would not have been in substance repugnant to the act to regulate commerce since, as the rate from which the repugnancy would arise would only apply to business done by the combination, and as the combination would have to be dissolved because of the repugnancy, therefore the repugnancy would cease to exist from the very fact that it arose. But this argument only restates the contention concerning another aspect of the case which we have previously disposed of and serves to emphasize the view that it is impossible to conceive that the decision of this court recognized the right of the Terminal Company to continue to exist provided certain features in its organization which were in conflict with the Anti-Trust Act were removed, and yet at the same time provided that when such features were removed the right to continue should be lost by the fact of its exercise. The particular expression of disapproval of the form of rate stated in the clause relied upon could only have been based upon one of two conceptions: First, the intention if such a charge was attempted to be exacted under the future operation of the company which was permitted, to lay down

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a rule forbidding such a charge in the future by the Terminal Company and thereby expressing an opinion upon and controlling a subject plainly beyond the primary sphere of the judicial power and exclusively within the original cognizance of the Interstate Commerce Commission under the terms of the act to regulate commerce; or second, as there was contention in the record as to whether such a form of rate was charged, and if it was, as to its legality, the expressions on that subject were used only to exclude all inference that the [209] judicial recognition of the right of the Terminal Company to continue in business on compliance with exactions which were required carried with it an implication of approval also to continue to exact the rate in question if it was being exacted, thus excluding all room for the contention that the provisions of the act to regulate commerce were in any way interfered with. That the expressions relied upon did not have the first meaning and therefore solely had the second, so clearly results from the context of the mandate; that is, from its seventh paragraph, as to need no further consideration of the subject. The clause is as follows:

"Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such commission."

Comprehensively considering and once again weighing all the contentions pressed upon us by the United States, we are of the opinion they all in last analysis rest upon the following contradictory assumptions: (a) That the decision of this court destroyed one set of public rights upon the theory of protecting another set; (b) that it proposed to correct an abuse of one statute by conferring authority to violate another; (c) that while exerting the authority of enforcing one statute the power was assumed of setting aside the provisions of another statute. On the contrary, when the confusion upon which these views rest is disregarded, we are of the opinion that the decision involved none of these contrarieties or conflicts, since in the public interest

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and to open wide the avenues of commerce and make them free to the enjoyment of all it commanded the correction of conditions impeding that result and [210] which were in conflict with the Anti-Trust Act, thus bringing the assailed combination under the law of the land and leaving it to be controlled by such law.

It follows from what we have said that the decree below giving effect to the mandate of this court will be modified so as to recognize the right of the Terminal Company as an accessory to its strictly terminal business to carry on transportation as to business exclusively originating on its lines, exclusively moving thereon and exclusively intended for delivery on the same, and in other respects the decree will be affirmed.

Modified and affirmed.

Mr. Justice HOLMES and Mr. Justice McREYNOLDS took no part in the decision of this case.

**STROUT v. UNITED SHOE MACHINERY CO.
ET AL.***

(District Court, D. Massachusetts. March 30, 1912.)

[195 Fed. Rep., 313.]

MONOPOLIES (§ 28)—ACTIONS FOR DAMAGES BY COMBINATIONS—PLEADINGS—SUFFICIENCY.—A declaration, which alleges that defendant corporation was formed to suppress competition in shoe machinery, that, in pursuance of the plan, it and its officers, co-defendants, acted in combination and conspiracy in restraint of plaintiff's trade; that the trade to be restrained was interstate; that enumerated things were done by the corporation and its officers to attain such restraint of plaintiff's trade; that thereby competition was destroyed and the monopoly of the corporation sustained; and that plaintiff's property and business were injured thereby, states a cause of action under Sherman Anti-Trust Act (act Cong. July 2, 1890, c. 647, § 7, 26 Stat., 210 [U. S. Comp. St., 1901, p. 3203]), authorizing any person injured in his business or property by any

* For later opinions (202 Fed. 602), see *post*, page 540; (208 Fed., 646), see *post*, page 544.

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person or corporation, by reason of anything forbidden in the act, to sue therefor in the Federal Circuit Court in the district in which defendant resides or is found.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig., § 28.]

PLEADING (§17) — JURISDICTION — FEDERAL COURTS — PLEADINGS.—

Where the question relates to the jurisdiction of Federal courts under a Federal statute, the averments of the pleadings purporting to give jurisdiction must be positive, and argumentative inferences are insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig., §§ 38, 41, 850; Dec. Dig., § 17.]

MONOPOLIES (§ 28) — CIVIL ACTIONS — STATUTES.—The remedy given by the Sherman Anti-Trust Act (act Cong. July 2, 1890, c. 647, § 7, 26 Stat., 210 [U. S. Comp. St., 1901, p. 3202]), authorizing an action for threefold damages, sustained by any person injured in consequence of any act forbidden or declared to be unlawful by the act, is a civil remedy for private injury, compensatory in its purpose and effect, and the threefold damages recoverable are exemplary damages.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig., § 18; Dec. Dig. § 28.]

[§14] COURTS (§ 264) — RIGHT TO SUE — JURISDICTION.—A mere chancery receiver, having no title to the assets or to the claim sued on, cannot maintain an action in the Federal courts in a jurisdiction other than that in which he was appointed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. § 264.]

Actions by or against receivers of Federal courts, see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 49.]

CORPORATIONS (§ 560) — RIGHT TO SUE — JURISDICTION.—A receiver of a corporation who is a successor in title of the corporation may sue in a foreign jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.]

CORPORATIONS (§ 560) — TRUSTEES ON DISSOLUTION — POWERS.—A trustee of a Maine corporation, appointed in proceedings for the dissolution of the corporation under Rev. St. Me. c. 47, §§ 77-81, 89, providing for the dissolution of corporations and the appointment of trustees, is vested by operation of law with the title of the dissolved corporation, and he has capacity to sue in a foreign jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.]

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CORPORATIONS (§ 560)—DISSOLUTION—TRUSTEES—POWER TO SUE.—

The power of a trustee of a Maine corporation, appointed under Rev. St. Me. c. 47, §§ 77-81, 89, in proceedings for the dissolution of the corporation, is not affected by the provision giving dissolved corporations existence for three years to prosecute and defend suits, and he may prosecute suits after the expiration of the three years.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2263-2269, 2262; Dec. Dig. § 560.]

At Law. Action by Charles A. Strout, trustee of the Goddu Sons Metal Fastening Company, against the United Shoe Machinery Company and others. Motion to dismiss denied, and plea in abatement overruled.

Whipple, Sears & Ogden and Dunbar & Rackemann, for plaintiff.

Coolidge & Hight, W. H. Coolidge, and C. A. Hight, specially, for defendants.

HALE, District Judge. This case now comes before the court upon the United Shoe Machinery Company's motion to dismiss, because it appears upon the face of the record that the court has no jurisdiction; and upon the plea in abatement of all the defendants, raising the contention that the plaintiff is without capacity to sue in this jurisdiction.

[1] 1. In the motion to dismiss, the United Shoe Machinery Company urges that the court has no jurisdiction of the case, for the reason, appearing upon the face of the record, that the plaintiff is a citizen of the State of Maine, and the United Shoe Machinery Company, defendant, is a corporation organized and existing under the laws of the State of New Jersey; and neither the plaintiff nor defendant is a citizen of the State of Massachusetts.

The writ shows that the plaintiff is "Charles A. Strout, as he is the duly appointed trustee of the Goddu Sons Metal Fastening Company, [315] and a citizen of the State of Maine." The defendants are described in the writ as follows:

"United Shoe Machinery Company, a corporation duly organized under the laws of the State of New Jersey, and a citizen of the State

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of New Jersey, having an office and its principal place of business in Boston, in the Commonwealth of Massachusetts, and found in the district of Massachusetts.

"Sidney W. Winslow, of Orleans, in the county of Barnstable, Commonwealth of Massachusetts.

"George W. Brown and Edward P. Hurd, both of Newton, in the county of Middlesex, Commonwealth of Massachusetts.

"Said Winslow, Brown, and Hurd being severally citizens of the Commonwealth of Massachusetts, in the district of Massachusetts."

The amount of damages claimed is \$2,000,000.

The court, then, has before it a citizen of Maine suing a citizen of New Jersey in a civil action, brought in the Circuit Court of the United States for the District of Massachusetts. The obvious contention is raised by defendant that in any ordinary civil action a citizen of New Jersey cannot be called to answer a suit by a citizen of the State of Maine in the United States Court for the District of Massachusetts. The plaintiff does not controvert this suggestion, but says that the action is brought under the Sherman Anti-Trust Statute, the act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and that the declaration clearly presents a cause of action under section 7 of that act, which provides as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or *is found*, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

It will be seen that, under this section, without respect to the amount in controversy, such action may be brought in the district in which the defendant resides or *is found*. And it is not denied that the defendants in the case at bar are found in the district of Massachusetts. It is contended, however, that the declaration does not clearly show that the action is brought under the Sherman Anti-Trust Act; that it does not sufficiently appear by the writ and declaration that the case is confined to an action under this statute; that therefore the jurisdiction of the court does not affirmatively appear; and that, where threefold damages are sought

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by virtue of the statute, the declaration must state a case clearly and unequivocally authorized by the law. The substance of the declaration is stated sufficiently for the purposes of this case in the summary given by the defendant, as follows:

"That the Goddu Sons Metal Fastening Company was organized under the laws of the State of Maine as a corporation in 1897, for the purpose of manufacturing and dealing in shoe machinery. That it acquired certain patents pertaining to shoe machinery, and made preparation to place on the market throughout the United States machines constructed under its patents. That the defendant the United Shoe Machinery Company was organized on February 7, 1899, under the laws of the State of New Jersey. That since its organization it has been engaged in the manufacture of, and dealing in, shoe [616] machinery throughout the United States and in foreign countries. That upon the organization of the United Shoe Machinery Company, the defendant Winslow became, and ever since has continued to be, its president, a director, and member of the executive committee. That the defendant Brown became its treasurer, a director, and member of the executive committee, and the defendant Hurd became assistant treasurer, a director, and member of the executive committee. That these individual defendants down to the present time have continued to exercise the management and control of the business affairs of the corporation.

"That the United Shoe Machinery Company was formed with the idea of suppressing and eliminating competition. That shortly after the formation of the company the individual defendants, or some of them, entered into negotiations with certain stockholders of the Goddu Sons Metal Fastening Company for the purchase of their stock by the United Shoe Machinery Company. That as a result of the negotiations the United Shoe Machinery Company purchased a majority of the stock of the Goddu Company, thereby acquiring control and management of the corporation. That the United Shoe Machinery Company caused to be elected as officers of the Goddu Company its own president, the defendant Winslow, as president of the Goddu Company; its own treasurer, the defendant Brown, as treasurer of the Goddu Company, and a part of its own directors, including the defendant Hurd, as the entire board of directors of the Goddu Company. That the persons so elected have continued to be the officers of the Goddu Company. That in pursuance of the plan and purpose to suppress and eliminate competition, and to support and protect the monopoly of the United Shoe Machinery Company, the United Shoe Machinery Company and the individual defendants, in combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations, have controlled the management of the Goddu Company, not for the

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purpose of carrying on and developing the business of said company, but for the purpose of preventing the said company from doing business, thereby destroying the competition of said company. That they have declined to cause the company to make any use of its patents, or permit it to do business, and have continuously prevented it from engaging in business so that the assets of the company have remained idle and become wasted, and the patents and patent rights are about to expire and have become practically worthless. That by these means the plan of the United Shoe Machinery Company and the individual defendants has been effected and accomplished, in that the competition of the Goddu Company has been destroyed and the monopoly of the United Shoe Machinery Company sustained. That thereby the Goddu Company has been greatly injured in its business and property, in that its patents, patent rights, and other assets have been rendered worthless. Wherefore the plaintiff is entitled to recover from the defendant threefold the damages by him sustained, and also the costs of this suit, including a reasonable attorney's fee."

It is contended that this is not a declaration unmistakably under the Sherman Act; that this act is not referred to; and the presumption is that the cause is without the jurisdiction of the Federal courts, unless the contrary affirmatively appears; but that the case must be treated as one based upon diversity of citizenship; and that therefore it must be dismissed as to the United Shoe Machinery Company. Upon examination of the declaration, it is found that there is not a word in its expressly stating that the action is brought under the Sherman Anti-Trust Act. There is no mention of the act, or reference to it in distinct terms. It is not even stated that the defendant became liable by force of the act. But it does appear from the declaration that the defendant company was formed with the plan of suppressing competition, and of maintaining a monopoly of the shoe machinery business; that in pursuance of such plan the defendant acted [317] in combination and conspiracy in restraint of plaintiff's trade; that the trade to be restrained was interstate; that certain things were done by the defendants to attain such restraint of the plaintiff's trade; and that thereby the competition of the plaintiff company has been destroyed, the monopoly of the defendant company sustained, and the plaintiff's property and business injured. I see no need of restating the whole

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of the declaration. A fair reading of it leaves no doubt that the action was brought under section 7 of the Sherman Act. No question can be left in the mind of the court that the pleader intended to state a case under that section. This is so clear that I cannot think it necessary to label the declaration as one brought under the provisions of the Sherman Act. The allegations make it plain that the action is clearly founded upon that act, and upon that alone, and that no common-law remedy, or other remedy of any kind, is sought.

[2, 3] The doctrine of the Federal courts is unquestionably that in matters of pleading inferences from equivocal and uncertain allegations cannot be followed, and that, where the question relates to jurisdiction, argumentative inferences are not sufficient to establish jurisdiction. The averments must be positive; and the court cannot retain jurisdiction over a doubtful record to say whether or not the intention was to bring the case under a specific act. The learned counsel for the defendants have called attention to the leading cases upon this subject. The court in this circuit has expressed itself clearly in *Jenkins v. York Cliffs Improvement Company* (C. C.) 110 Fed. 807. But the declaration in this case seems to me to be perfectly clear. The averments are such as to show unequivocally that the action is brought under section 7 of the Sherman Law, even though the plaintiff did not in terms mention that statute. This was not necessary so long as the allegations were such as to preclude the defendant from being misled, and to prevent the plaintiff from urging at any later stage in the case that he intended merely to state a common-law action. Section 7 of the Sherman Law is so clear and plain in its provisions that its meaning cannot be uncertain. It is not in its nature and substance a penal action; its vindication does not rest with the State; it has been held repeatedly to be a civil remedy for private injury, compensatory in its purpose and effect. It provides for the recovery of threefold damages sustained by the plaintiff, which are held to be exemplary damages. *People's Tobacco Co. v. American Tobacco Co.*, 170 Fed. 396, 95

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C. C. A. 566; *Atlanta v. Chattanooga Foundry & Pipe Co.* (C. C.) 101 Fed. 900; *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1128; *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann Cas. 815.

The motion to dismiss must be denied.

[4-6] 2. In the plea in abatement the defendants raise the contention that the plaintiff is without capacity to sue in the Federal court in the district of Massachusetts. The facts set forth in the plea are briefly stated by the learned counsel for the defendant in his brief. They are as follows:

"The Goddu Sons Metal Fastening Company was a corporation organized under the laws of the State of Maine in the year 1897. On the 7th day of [§18] January, 1905, a suit in equity was brought in the Supreme Judicial Court for the State of Maine, county of Cumberland, by the treasurer of the company, pursuant to a vote of the stockholders, for the dissolution of said company, under authority of the statutes of the State of Maine, providing for the voluntary dissolution of corporations.

"On February 17, 1905, a decree was entered in the equity suit dissolving said corporation, the decree providing that 'the defendant corporation, known as the Goddu Sons Metal Fastening Company, be, and the same hereby is, dissolved as and from the date of this decree,' and by the same decree Robert T. Whitehouse, of Portland, was appointed trustee, to collect by suit or otherwise all outstanding debts or claims due the corporation, and to take possession of all effects, property, and assets of every name and nature belonging to the corporation, and to do certain other acts in connection with the liquidation of the company's affairs. As set forth in the decree, Mr. Whitehouse qualified as trustee by giving the bond required.

"On July 19, 1911, Mr. Whitehouse filed a petition to be permitted to resign as trustee, and on July 19, 1911, he was permitted to resign, and a further decree was entered appointing Charles A. Strout, the plaintiff, as successor trustee.

"The decree appointing Charles A. Strout was practically the same as the one appointing Mr. Whitehouse, except that there was added to the decree provisions that 'all questions not hereby disposed of are reserved for further adjudication.' And 'It is further ordered that this decree is subject to such further orders as the court may from time to time see fit, and that said trustee or any persons in interest have liberty to apply to this court at any time for such modification of this order as they may be advised.'"

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The appointment of the plaintiff as trustee was made under section 81 of chapter 47 of the Revised Statutes of Maine. It will be necessary to consider the following sections of that chapter, relating to the dissolution of corporations:

"Sec. 77. Corporations, whose charters expire or are otherwise terminated, have a corporate existence for three years thereafter; to prosecute and defend suits; to settle and close their concerns; to dispose of their property; and to divide their capitals.

"Sec. 78. When the charter of a corporation expires or is terminated, a creditor or stockholder may apply to the Supreme Judicial Court, which may appoint one or more trustees to take charge of its estate and effects, with power to collect its debts, and prosecute and defend suits at law; and to sell and convey its real estate; and if sold at auction, the same notice shall be given as in the sale of lands of corporations on execution. The court has jurisdiction in equity of all proceedings therein and may make such orders and decrees and issue such injunctions as are necessary.

"Sec. 79. The debts of the corporation shall be paid in full by such trustees when the funds are sufficient; when not, ratably to those creditors, who prove their debts, as the law provides, or as the court directs. Any balance remaining shall be distributed among the stockholders or their legal representatives in proportion to their interests.

"Sec. 80. Except where otherwise provided by statute, whenever at any meeting of its stockholders, legally called therefor, such stockholders vote to dissolve such corporation, a bill in equity against the same for dissolution thereof may be filed by any officer, stockholder, or creditor in the Supreme Judicial Court, in the county in which it has an established place of business, or in which it held its last stockholders' meeting; upon said bill, such notice shall be given as may be ordered by any justice of said court, in term time or vacation, and upon proof thereof, such proceedings may be had according to the usual course of suits in equity, that said corporation shall be dissolved and terminated. Upon proof that there are no existing liabilities against said corporation, and no existing assets thereof, requiring distribution among the stockholders, said court may dissolve said corporation without the appointment of trustees or receivers.

"Sec. 81. Said court has jurisdiction in said cause to appoint receivers, ~~is~~^{to} issue injunctions, and pass interlocutory decrees and orders, according to the usual course of proceedings in equity; and shall, moreover, upon dissolving said corporation, or upon terminating its charter, appoint one or more trustees, who shall have all the powers conferred upon similar trustees by sections seventy-seven, seventy-eight, seventy-nine, and eighty-nine, or by any other law of

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the State, with such special powers as may be given them by said court. But, notwithstanding the appointment of such trustees, said court may superintend the collection and distribution of the assets of said corporation, and may retain said bill for that purpose."

Section 89 refers to trustees and receivers. It provides that they may bring suit within two years to compel any one who has subscribed for stock in the corporation they represent to pay for the same.

(a) The first contention raised by the plea in abatement is that the trustee in this suit has not sufficient title to warrant him in bringing suit in this jurisdiction; but that he is the ordinary equity receiver without title. The defendants urge that, although called trustee in the decree of the court appointing him, the plaintiff is really nothing more than a chancery receiver without title, coming within that class of receivers which lacks any extraterritorial power of official action.

The law must be regarded as settled that the mere chancery receiver, having no title to the assets or to the claim sued upon, cannot maintain an action in the Federal courts, in a jurisdiction other than that in which he was appointed. *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164; *Hale v. Atkinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380. In *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, the Supreme Court passed upon the rights of officials of a different character who were allowed to bring suits outside of the jurisdiction of their appointment. In this circuit, in *Hale v. Hardon* (C. C.), 89 Fed. 283, Judge Putnam has designated the different classes of receivers: First, those who are true successors in title, as in *Relfe v. Rundle*. Second, those who have received underlying support from the corporation itself, by voluntary assignments or by force of titles acquired through involuntary proceedings in insolvency or otherwise, as in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, and *Telegraph Co. v. Purdy*, 162 U. S. 337, 16 Sup. Ct. 810, 40 L. Ed. 986. The third are so-called receivers, like the commissioner in *Hazard v. Durant* (C. C.), 19 Fed. 471, who are nothing more or less than masters in chancery, appointed, as the hand of the court, to complete the incidents of the litigation. The first class of re-

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ceivers, namely, those who are true successors in title, as in *Relfe v. Rundie*, have the right to sue anywhere. In the third class, the receiver or trustee has simply the powers of a chancery receiver; he cannot maintain an action in foreign jurisdictions.

In the case at bar the defendants urge that the plaintiff comes under the third class of receivers in the order named by Judge Putnam; that he is a mere officer of the court, having no title to the property, and with no capacity to sue in this jurisdiction. Upon examination of the statutes, we find that section 78 of chapter 47 of the Revised Statutes of Maine specifically provides that the trustee has the power to prosecute and defend suits at law. Section 80 provides for the dissolution of the corporation, without the appointment of trustees [§20] or receivers in cases where there are no assets. Section 81 gives the court jurisdiction to appoint trustees and receivers upon dissolving the corporation, or upon terminating its charter, and gives these trustees powers conferred upon similar trustees by sections 77, 78, 79, and 89, or by any other law of the State. The defendants contend that, after February 17, 1905, the date of the decree appointing the trustee to wind up the affairs of the Goddu Company, by virtue of the laws of the State of Maine, the property of that company became vested in the persons who were at the time shareholders, as tenants in common under section 95 of chapter 47 of the Revised Statutes of Maine, which provides:

"When a corporation is dissolved, its real and personal estate is vested in the persons who were at the time shareholders, as tenants in common according to their interests."

In the original statute, the legislature undoubtedly intended to change the rule of the common law that, in the absence of statute, upon the dissolution of a corporation, its real estate reverted to the grantors and to their heirs, and its personal estate vested in the people. *Titcomb v. Insurance Co.*, 79 Me. 316, 9 Atl. 732; 2 Kent's Com. (10th Ed.) 385. In the revision of the Maine Statutes of 1841 (chapter 76, § 28) the statute read:

"On the final dissolution of any corporation, all its real and personal estate, *not legally disposed of*, shall be vested in the individuals who may be stockholders, etc."

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In the revision of 1857 (chapter 46, § 37) this section appears phrased in its present form. Sections 80 and 81 were enacted in 1877. They provide for the dissolution of a corporation and for administering its effects, leaving nothing whatever to vest in the shareholders. In *Cobb v. Camden Savings Bank*, 106 Me. 178, 76 Atl. 667, 20 Ann. Cas. 547, Cobb and Moore were appointed receivers and trustees of the Mt. Battie Manufacturing Company under sections 80 and 81 of chapter 47 of the Revised Statutes of Maine. In referring to the title of the receivers, Mr. Justice Savage, speaking for the court, said:

"It should be remembered that the proceedings under which these receivers are acting are statutory in their origin and character. It is not a creditors' bill. It is not a proceeding at common law. It is not a supplementary proceeding to a suit. * * * In former days, in common-law proceedings, it was generally held that appointment of a receiver did not operate to convey to him the title to real estate; but in modern times the doctrine has grown up and appears to be well established that at least in statutory proceedings for the dissolution of a corporation, the decree of appointment, *ipso facto*, vests the title to the real estate in the receiver."

The defendants urge that the court in that case did not decide that the decree of appointment of trustee vests the title of the property in the trustee, because the point did not necessarily arise in the case, and that whatever the court said upon the subject was mere dictum. But I cannot take this view. The case was a writ of entry brought by the plaintiffs, as trustees and receivers of the Maine corporation, which had been dissolved under the same statutory provisions as those under which this plaintiff in the case at bar was appointed trustee. [321] The action was brought to recover land to which the plaintiffs claimed title in their capacity of trustees and receivers; and the plaintiffs were allowed to recover. It is unquestioned that a real action cannot be maintained without title; for the plaintiff must declare "on his own seisin," and must prove title. My attention is called to the fact that in the report of the Cobb case it appears that, on the same day on which the decree of dissolution was entered, a conveyance was made by the corporation to the trustees; but in the opinion of the court in that case no effect was given to this deed.

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And it is evident that the title of the plaintiffs was held to rest entirely upon the statute authorizing their appointment. *Cobb v. Camden Savings Bank* is, I think, decisive of the case at bar. It is clear that, in construing the statutes relating to the dissolution of corporations, the Maine court distinctly held that a trustee appointed, as the plaintiff in this case was appointed, under section 81 of chapter 47 of the Revised Statutes of Maine, is vested by operation of law with title to the property of the dissolved corporation. In *Avery v. Trust Co.* (C. C.), 72 Fed. 700, in an exhaustive and convincing opinion, Judge Putnam has passed upon a case substantially similar to the case now before the court. In *Am. National Bank v. National, etc.* (C. C.), 70 Fed. 420, a statute similar to the Maine statute was before the circuit court; and it was held unnecessary that the statute say in terms that the title should vest in the trustee, so long as the intention of the legislature was disclosed.

I am of the opinion that the trustee in the case at bar became vested by operation of law with the title of the dissolved corporation, and had the capacity to sue in this jurisdiction.

[7] (b) The defendant raises the further contention that, by the express provision of the laws of the State of Maine, the plaintiff's power to sue was limited to three years from the date of dissolution of the corporation; and that this period has long since expired. The defendants refer to section 77 of chapter 47, Revised Statutes of Maine, which gives the dissolved corporation existence for three years to prosecute and defend suits. They cite *Maine Shore Line Railroad v. Maine Central Railroad*, 92 Me. 476, 48 Atl. 113, decided in 1899, in which the court said:

"This suit was commenced within three years, and, upon the expiration thereof, the defendant moved to dismiss the action, because the same abated for the want of a plaintiff. It is stoutly contended that the plaintiff's corporate existence continues, after the expiration of the three years and until judgment shall be recovered. The statute does not say that it shall. Its only corporate existence is by virtue of that statute; and that continued its life three years, and no more. The legislature has not seen fit to intervene, and the court cannot vivify that which the legislature has allowed to expire.

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The plaintiff has no corporate existence, and can neither recover judgment nor suffer one against itself. Its action has abated, and there is no one who can revive it. It must be dismissed from the docket."

In that case no trustee had been appointed. It is urged by the plaintiff that one of the principal reasons which led to the statute authorizing the appointment of trustees was to meet exactly the situation arising in the Maine Shore Line Railroad case; it being apparent that the period of three years is often inadequate for winding up [322] the affairs of a dissolved corporation. In *Franklin Bank v. Cooper*, 36 Me. 179, cited by the learned counsel for defendants, the decision of the court was founded upon a special statute; and the court's reasoning and result are not convincing in the case at bar. In this case I am persuaded, and I have already held, that the trustee became vested by operation of the statutes of Maine with the title to the property of the dissolved corporation. Upon the resignation of the trustee first appointed by the court, the successor trustee became vested, by force of the statute, with the title to the remaining property of the dissolved corporation. It is true that the court cannot "vivify that which the legislature has allowed to expire"; but in the case before me the legislature has not allowed the title of the trustee to expire. By the statute under which the trustee was appointed, the legislature has vested the title of the property in the trustee. If the powers of such trustee could not be continued longer than the corporate existence of the corporation, one of the main purposes of the statute would be defeated. The title of the property, once having vested in the trustee, was not affected by the statute limiting the corporation's right to sue to three years from the date of its dissolution. I think the trustee's right to sue still exists, and is properly exercised in the case at bar.

The conclusion of the court, then, is that the motion to dismiss for lack of jurisdiction is denied. The plea in abatement is overruled. Defendants may answer further. .

Syllabus.

STROUT v. UNITED SHOE MACHINERY CO.
ET AL.*

(District Court, D. Massachusetts. January 31, 1913.)

[202 Fed. Rep., 602.]

MONOPOLIES (§ 28)—ANTI-TRUST ACT—VIOLATION—DECLARATION.—

A declaration for civil damages for violating Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), alleged that complainant trustee had succeeded to all the rights of a metal shoe fastening company owning patents on shoe machinery, which it was incorporated to manufacture and sell to the trade, that defendant shoe machinery company was organized and continued to exist to maintain a monopoly of the shoe machinery business, that it had acquired such monopoly, and, having obtained a majority of the stock of plaintiff's corporation, refused to permit it to do business in order to prevent competition with other machines controlled by it, permitted the corporation's property to remain idle and become wasted until the patents were about to expire and had become practically worthless, and that the corporation had been greatly injured in its business by reason thereof. *Held* to state a sufficient cause of action to withstand a demurrer.^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

PLEADING (§ 64)—DUPLICITY—VIOLATION OF ANTI-TRUST ACT.—Since the thing forbidden by Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 8200), may consist of a scheme as a whole or an unlawful combination as a whole, a declaration for civil damages authorized by section 7, charging in a single count that defendant was an illegal combination in restraint of trade, etc., and that by reason of conspiracy and monopoly defendant had practically monopolized the entire business of manufacturing shoe machinery in the United States, and had utterly destroyed plaintiff's interstate trade and commerce in such machinery, and rendered plaintiff's patents valueless, etc., was not objectionable for duplicity and uncertainty, on the theory that each one of the things forbidden in sections 1 and 2 were distinct offenses, and that the declaration should charge such separate offenses in separate counts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.]

* For prior opinion (195 Fed. 313) see *ante*, page 528. For later opinion (208 Fed. 646) see *post*, page 544.

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Opinion of the Court.

At Law. Action by Charles A. Strout, trustee, against the United Shoe Machinery Company and others. On demurrer to declaration. Overruled.

See, also, 195 Fed. 313.

Whipple, Sears & Ogden and Dunbar & Rackemann, all of Boston, Mass., for plaintiff.

Coolidge & Hight, of Boston, Mass., for defendants.

COLT, Circuit Judge.

This is an action at law, brought under section 7 of the Anti-Trust Act of July 2, 1890 (26 Stat. 210, c. 647 [U. S. Comp. St. 1901, p. 3202]); and the case was heard on demurrer to the declaration. Section 7 reads as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The material averments in the declaration may be thus summarized:

The declaration alleges in substance that the plaintiff is trustee of the Goddu Sons Metal Fastening Company, duly appointed by the Supreme Judicial Court of Maine in proceedings for the dissolution of that corporation; that as such trustee he holds title to all property and rights of action of the Goddu Sons Metal Fastening Company; that the Goddu Sons Metal Fastening Company, after its organization in 1897, acquired certain patents pertaining to shoe machinery, and that it made preparations to place upon the market machines constructed under its patents, and spent a considerable sum in advertising; that it constructed machines ready for sale or lease; that a number of shoe manufacturers were desirous of using these machines upon terms beneficial to the company; that the company was prepared and intended to engage in trade and

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commerce, and to do a large and profitable business in shoe machinery among the several States and with foreign nations; that the defendant the United Shoe Machinery Company was organized in 1899, for the purpose of acquiring by legal and illegal means certain companies engaged in manufacturing and dealing in shoe machinery, and of driving out of business other companies or concerns engaged in that business, and of preventing other companies or concerns from entering into that business, thereby suppressing and preventing competition and acquiring and maintaining a monopoly of the shoe machinery business, and that it has acquired and now maintains a practical monopoly of that business; that the defendants Winslow, Brown, and Hurd are, and have been since the organization of the United Shoe Machinery Company, officers and directors and members of the executive committee of that corporation, exercising management and control of its business affairs; that in pursuance of the plan to suppress and eliminate competition, and to support and protect the monopoly of the United Shoe Machinery Company, the individual defendants, or some of them, entered into negotiations with certain of the stockholders of the Goddu Sons Metal Fastening Company for the purchase of their stock, and that as a result of these negotiations the United Shoe Machinery Company acquired a majority of the stock and the control and management of the Goddu Sons Metal Fastening Company; that in pursuance of its plan to eliminate competition, and to support and protect its monopoly, the United Shoe Machinery Company caused its president, the defendant Winslow, to be elected president of the Goddu Sons Metal Fastening Company, its own treasurer, the defendant Brown, to be elected treasurer of the Goddu Sons Metal Fastening Company, and a part of its own directors, including the defendant Hurd, to be elected as the entire board of directors of the Goddu Sons Metal Fastening Company; that the persons so elected have ever since been continued in their respective offices by means of the stock control exercised by the United Shoe Machinery Company; that the control thus acquired by the United Shoe Machin-

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ery Com[604]pany has been exercised, not for the purpose of carrying on and developing the business for which the Goddu Sons Metal Fastening Company was organized, but for the purpose of preventing that company from doing business, thereby preventing and destroying its competition, and protecting and supporting the monopoly of the United Shoe Machinery Company; that the officers of the Goddu Sons Metal Fastening Company, in pursuance of the plan and purpose of the United Shoe Machinery Company, have continuously declined to cause the Goddu Sons Metal Fastening Company to make any use of its patents and patent rights, or to permit it to do any business; that the assets of the Goddu Sons Metal Fastening Company have thus remained idle and have become wasted, and that its patents are now about to expire and have become practically worthless; that the United Shoe Machinery Company and the individual defendants have thus accomplished their purpose of destroying the competition of the Goddu Sons Metal Fastening Company, and of sustaining the monopoly of the United Shoe Machinery Company; that the Goddu Sons Metal Fastening Company has been greatly injured in its business and property; and that the plaintiff is entitled, under the Sherman Anti-Trust Act, to recover three-fold damages, costs of suit, and a reasonable attorney's fee.

[1] It is sufficient to state the main ground of demurrer upon which the defendant relies in its brief and oral argument:

"The declaration fails to set forth with substantial certainty substantive facts constituting a cause of action against the defendants under the Sherman Anti-Trust Act."

Upon a careful reading of this declaration, and admitting, as the demurrer does admit, the truth of the material allegations contained therein, I am not prepared to hold that the defendant fails to state a cause of action under the Sherman Anti-Trust Act.

[2] The main argument of the defendant in this case is the same as was advanced in *Cilley v. United Shoe Machinery Company*, 202 Fed. 598, namely, that the Sherman Act forbids six or seven distinct and separate things, and that in an action brought under section 7 the declaration

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should set forth in one or more counts the separate thing or things declared to be unlawful by the act.

As was said in the opinion in the Cilley case, this is not the construction given to the first and second sections of the act by the Supreme Court. *Swift v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 49 L. Ed. 518; *United States v. American Tobacco Company*, 221 U. S. 106, 184, 31 Sup. Ct. 632, 55 L. Ed. 663. Under these decisions it cannot be said with confidence that a declaration under section 7 may not state, in a narrative form, a scheme, or plan, or combination, which, as a whole, may constitute an unreasonable or undue restraint of trade within the meaning of the act.

In the case at bar I am not prepared to say that the declaration does not state sufficient facts which, if proved, would show a plan or combination in restraint of trade within the meaning of the act.

Demurrer overruled.

STROUT v. UNITED SHOE MACHINERY CO.
ET AL.*

(District Court, D. Massachusetts. September 15, 1913.)

[208 Fed. Rep., 646.]

PLEADING (§ 180).—INCONSISTENT ALLEGATIONS.—EFFECT.—Where, in a suit by a substituted trustee of a corporation to recover damages alleged to have resulted to the corporation's business from a secret conspiracy by defendants in alleged violation of the Anti-Trust Act, plaintiff described himself as trustee of the corporation, and alleged that he had been appointed substituted trustee in a proceeding in Maine for the dissolution of the corporation, and that the decree vested in his predecessor all the corporation's choses in action, property, etc., and that he had succeeded thereto, and had received authority to collect all debts and claims due the corporation, his denial in a replication that the corporation or its officers, after the decree had been entered, were without control of the corporation's affairs or management, was inconsistent with the allegations of his declaration, and no force could be given thereto.^b

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.]

* For prior opinions (195 Fed. 813), see *ante*, page 526; (202 Fed. 602), see *ante*, page 540.

^b Syllabus copyrighted 1913, 1914, by West Publishing Company.

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CORPORATIONS (§ 619)—ACTS AFTER DISSOLUTION—LIABILITY OF OFFICERS TO TRUSTEE.—Where a trustee was appointed for a corporation in dissolution proceedings February 17, 1905, and a substituted trustee thereafter sued [§47] defendants, who controlled the corporation, for alleged injuries to its business, charging that they so managed the corporation as to destroy its competition with another corporation, and refused to permit use of patents owned by plaintiff's company, or permit it to do business, plaintiff could not recover for any of such alleged acts committed after the date of the appointment of a trustee, since from that time defendants were not in control of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. § 619.]

LIMITATION OF ACTIONS (§ 34)—DISSOLUTION OF CORPORATION—ACTION BY TRUSTEE.—A trustee of a corporation, appointed in dissolution proceedings, could not recover damages alleged to have resulted to its business from a conspiracy of those previously in control, preventing the corporation from doing business and using its patents, where the acts charged were committed more than six years prior to the date of the writ.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151-157; Dec. Dig. § 34.]

LIMITATION OF ACTIONS (§ 192)—REPLY—FRAUDULENT CONCEALMENT.—Where plaintiff alleges fraudulent concealment in reply to a defense of limitations, it is not sufficient to allege generally that defendants fraudulently concealed the cause of action, but the fraud whereby such concealment was effected must be specified; nor will specific allegations of frauds or falsehoods by the defendants suffice, unless concealment of the cause of action would necessarily follow from them.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 699-702; Dec. Dig. § 192.]

LIMITATION OF ACTIONS (§ 192)—PLEADING—FRAUDULENT CONCEALMENT.—Plaintiff, in alleging fraudulent concealment in reply to a defense of limitations, must specify the date and circumstances of his discovery of the cause of action, and show that, though he exercised reasonable diligence, he was unable to discover it sooner.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 699-702; Dec. Dig. § 192.]

LIMITATION OF ACTIONS (§ 192)—FRAUDULENT CONCEALMENT—PLEADING.—Where, in an action by a substituted trustee of a corporation, appointed in dissolution proceedings, against those previously in control of the company for damages, due to defendants' acts, which were alleged to constitute an unlawful restraint of trade only, defendants pleaded limitations, and there was nothing to show a fiduciary relation between defendants and plaintiff, or his predecessor, requiring a disclosure of the facts, nor any breach of trust

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alleged as a basis of the action, there was nothing to relieve plaintiff from the obligation of specifying the fraud in a reply alleging fraudulent concealment of the cause of action; and hence a reply merely alleging that defendants fraudulently concealed the cause of action from plaintiff and his predecessor was insufficient.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 699-702; Dec. Dig. § 192.]

LIMITATION OF ACTIONS (§ 104)—CAUSE OF ACTION—ACCRUAL—FRAUDULENT CONCEALMENT.—If defendants, having secured control of the G. Company by buying a majority of its stock, elected officers or directors of their own choosing, including the three individual defendants, to form the G. Company's entire board of directors, and continued them in office at successive elections, stopping the G. Company's business, and enforcing the disuse of its patents in order to prevent its competition with another concern in which they were interested, such acts, not having been done in secret, [648] were incapable of alleged fraudulent concealment, so as to entitle the G. Company's trustee, in dissolution proceedings, to recover damages after limitations had run, on the ground that the acts had been fraudulently concealed by the defendants, and that the trustee had acquired knowledge thereof within the period limited.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 511-513; Dec. Dig. § 104.]

PLEADING (§ 360)—AVOIDANCE—FRAUDULENT CONCEALMENT—NOTICE—REPORTS OF DECIDED CASES.—Where, in a suit by a corporation's trustee in dissolution proceedings to recover damages against defendants for an alleged unlawful restraint of trade in managing the corporation, defendants pleaded limitations, and plaintiff replied that the cause of action had been fraudulently concealed by defendants, reports of decided cases involving the matters in controversy could not be resorted to, on a motion to strike the replication, as showing that defendants' alleged acts were matters of public record, which they had no power to conceal.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1129-1146; Dec. Dig. § 360.]

At Law. Action by Charles A. Strout, as substituted trustee of the Goddu Company, against the United Shoe Machinery Company and others. On motion to strike out amendment to special replication, and on demurrer to such replication. Judgment for defendants.

Whipple, Sears & Ogden and Dunbar & Rackemann, all of Boston, Mass., for complainant.

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Coolidge & Hight, W. H. Coolidge, C. A. Hight, and Charles F. Choate, jr., all of Boston, Mass., for defendants.

DODGE, Circuit Judge. The plaintiff's writ is dated September 8, 1911. A motion to dismiss was denied, and a plea in abatement overruled, March 30, 1912. 195 Fed. 313. The declaration was amended, and a demurrer to the amended declaration overruled, January 31, 1913. 202 Fed. 602. The opinion then filed explains the nature of the case and summarizes the allegations of the amended declaration then material.

On March 4, 1913, the defendants answered the amended declaration. Besides a denial of each and every allegation, their answer contains, among others, affirmative allegations in substance as follows:

The cause of action declared on did not accrue within six years before the suing out of the plaintiff's writ.

The action was not commenced within six years next after the cause of action accrued.

The company whereof the plaintiff is trustee was dissolved and its charter terminated by decree of the Maine Supreme Court entered February 17, 1905, in equity proceedings under Maine statutes, providing for voluntary dissolution of corporations; a trustee was on that day appointed to wind up its affairs according to said statutes; and from that day until the present time, and for more than six years prior to the bringing of this suit, the entire control and management of its affairs was in said court, and the defendants have not had, nor could have, anything to do therewith. The cause of action accrued before February 17, 1905, and not within six years prior to the suing out of the writ.

[649] On March 26, 1913, the defendants moved that the plaintiff be required to reply to the new matter thus set up in avoidance of the action. This motion was based on the provisions of Rev. Laws Mass. c. 173, § 31. It was allowed April 3, 1913.

In a "special replication," filed April 5, 1913, the plaintiff admitted:

"That on said date, February 17, 1905, a trustee was appointed, as provided by the statutes of the State of Maine, to wind up the affairs of the corporation"

—and denied all the remaining allegations above summarized from the answer.

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On April 10, 1918, the defendants demurred to this special replication, assigning causes of demurrer below considered.

On April 12, 1913, the plaintiff moved to strike out this demurrer, for the alleged reasons that the replication is in exact compliance with the motion to require it, and the statute whereon the same was based; it contains no new allegations not contained in the amended declaration, and can therefore raise no new issue not open on demurrer to the declaration; it does not in fact raise any such new issue; Rev. Laws Mass. c. 178, § 31, was not intended to enable a defendant, by an order requiring a replication, to continue to file dilatory pleadings preventing the plaintiff from proceeding to trial. This motion was denied April 28, 1913.

On May 3, 1918, the special replication was amended by adding thereto the following:

"The plaintiff further says that the defendants and each of them (in pursuance of the plan and conspiracy set forth in his amended declaration) fraudulently concealed the cause of action set forth in said amended declaration from the knowledge of the trustee appointed on February 17, 1905, as aforesaid, and that said trustee did not, prior to six years before the commencement of this action, or for some time thereafter, discover said cause of action."

On May 16, 1913, the defendants moved (leave to do so having been reserved to them when the above amendment was allowed) to strike out the amendment on the ground that it is manifestly false and sham pleading. In their motion they alleged, among other things:

That it is manifest on the face of the record that the cause of action and the matters and things complained of in the declaration could not be concealed by the defendants, not being within their control or secret knowledge, but being matters of record or of common knowledge, presumed to have been known by the trustee, of which he had means of discovery, and must have discovered if he exercised due diligence.

That it is of public record and general knowledge that the claims whereon the cause of action is based have been litigated in the Massachusetts courts for more than ten years before this suit was begun. (Certain Massachusetts decisions were here cited.)

That the plaintiff ought not to be allowed to evade the question raised under the statute of limitations by their demurrer to the replication, by thus amending said replication.

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On May 16, 1918, the defendants also demurred to the replication as amended, assigning the grounds assigned in their demurrer to the [650] original replication, with others. These grounds are now, after a hearing had, to be considered.

[1] The plaintiff's denials, in his replication, of the defendants' allegations that the Goddu Company, whereof he is trustee, was dissolved and its charter terminated by the decree of the Maine court, and that from and after the date of that decree the entire control and management of the company's affairs was with the Maine court, and not with the defendants, and that the defendants neither had nor could have any control or management of said affairs after said date, seem to me wholly inconsistent with his own allegations elsewhere regarding the decree referred to and its effect, as well as with his admission above quoted from his replication.

In his writ the plaintiff describes himself as trustee of the company. In his declaration he says he is successor as trustee to Whitehouse, appointed trustee by the Maine court's decree of February 17, 1905, "in a proceeding in equity for the dissolution of said corporation and the appointment of a trustee to wind up its affairs in accordance with the statutes of Maine in such case made and provided." In the same declaration he further says that the decree vested in said Whitehouse, as statutory successor and quasi assignee of the company, all its property, debts, claims, and choses in action; also that by Whitehouse's resignation, and his own appointment in Whitehouse's place by the same court, he had succeeded to Whitehouse in title to all the company's property and rights of action; and in the same declaration he says he has been duly appointed by the same court to collect all debts and claims due the company, and to take possession of all its property, of every name and nature.

The Maine statutes here referred to, the proceedings under them in the Maine court, and the effect of these proceedings have been considered in the opinion dated March 30, 1912, upon the plea in abatement and motion to dismiss

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in this case. 195 Fed. 313. It was there held, in the plaintiff's favor, that the trustee appointed in 1905 had capacity to bring this suit, because his appointment vested him, by operation of law, with the title of the dissolved corporation (195 Fed. 321, 322) and that his power to sue was unaffected by the limit of three years during which the statutes allowed the corporate existence of the company to continue, for certain limited purposes, after its final dissolution by the decree entered February 17, 1905.

[2, 3] Having admitted as above, as well as having alleged it on his own behalf, that a trustee was appointed by that decree under the statutes mentioned to wind up the dissolved company's affairs, I am unable to see how any effect can be given to any denial by the plaintiff that the company or its officers were, after the decree had been entered, without control of its affairs or management. The record shows that these statements were not open to denial by him. No denial such as the plaintiff now attempts can stand with his own allegations and admissions. I am obliged to consider it clear as matter of law upon the record that no act complained of by him as unlawful, and as having injured the Goddu Company in its business or property, [651] could have been done by the defendants after February 17, 1905. The mere existence of the alleged combination or conspiracy, however long continued, could not have injured that company's business or property, nor has the plaintiff said that its business or property were thus injured. Acts which the defendants had planned to do, as part of their alleged combination or conspiracy, must have been done by the defendants, and must have caused the injuries complained of, if recovery for them is to be had under the Anti-Trust Act. The injuries complained of are (1) waste of the Goddu Company's assets by enforced disuse, and (2) loss through such disuse of the value of its patents, etc., until they were about to expire. The defendants' acts alleged to have inflicted these injuries are (1) so managing the Goddu Company as to prevent or destroy its competition with the defendant United Shoe Machinery Company, instead of carrying on and developing

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its own business, and (2) refusing to cause it to use its own patents or let it do any business. Only while the defendants held their alleged control of the Goddu Company could they have done any of these acts. Only while it was capable of doing business could its business have been injured by such acts. The declaration alleges that the acts were done by virtue of the same alleged control, without which allegation, indeed, it would not have made the acts appear as unlawful under the statute. That none of the acts referred to could have been done after title and possession of all the Goddu Company's property, of every kind, had passed from it to a trustee, in dissolution proceedings of the kind alleged and admitted as above, and that the defendants' alleged control of the company was of necessity ended by such appointment, as well as its capacity to do business capable of injury by them, I must regard as obvious. If so, no injury for which the company or its trustee can recover can have been done to it within six years prior to the date of the writ. The demurrer to the replication, so far as it rests on the grounds numbered 8-12, inclusive, is therefore sustained.

The amendment to the replication is an attempt to avert the above conclusion by setting up that the trustee under the appointment made February 17, 1905 (or his successor, the plaintiff), did not find out that any cause of action existed prior to that time; the same having been fraudulently concealed by the defendants, and not discovered by the trustee until within six years before the date of the writ.

[4] A plaintiff who, in reply to a defense setting up the statute of limitations, alleges fraudulent concealment of a cause of action by the defendant, is required to specify the fraud whereby such concealment was effected. It is not sufficient to allege generally that the defendant fraudulently concealed the cause of action, without further specification. This is one of the cases wherein a general allegation of fraud is not enough. Nor will specific allegations of frauds or falsehoods by the defendant suffice, unless concealment of the cause of action would necessarily follow from them. *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807.

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[5] A plaintiff, answering such a defense, is also required to specify [652] by the date and circumstances of his discovery of the cause of action, and his allegations must show that he exercised reasonable diligence, yet was unable to discover it earlier. *Wood v. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 607; *Hardt v. Heidweyer*, 152 U. S. 547, 559, 560, 14 Sup. Ct. 671, 38 L. Ed. 548.

[6] No such specifications are found in the plaintiff's replication as amended. The amendment amounts to no more than a bare allegation that the defendants fraudulently concealed the cause of action from him or his predecessor. No attempt is made in it to comply with either of the above requirements, nor does the bracketed clause, asserting the concealment to have been "in pursuance of the plan of conspiracy set forth," in the declaration, do anything toward supplying what is deficient. The plaintiff says that, because he had alleged three of the defendants to have been officers of the Goddu Company when the acts claimed to have injured that company were done, the above requirements do not apply. It is true that, when the cause of action is fraud or breach of trust, secret in its nature, and there are fiduciary relations requiring disclosure by the defendants, fraudulent concealment of the cause of action may appear from the transaction itself, sufficiently for the purpose of preventing the statutory limitation from beginning to run. But this plaintiff has not made the defendants' acts complained of appear to have been secret in their nature, or such that their existence could not be readily ascertained; nor has he made it appear that any fiduciary relations requiring disclosure existed between himself or his predecessor and the defendants. Nor, if he had made these things appear, has he based his claim upon fraud or breach of trust. His cause of action is unlawful restraint of trade only. There is nothing, therefore, which relieves him from specifying as ordinarily required, if he undertakes to assert fraudulent concealment of the cause of action in order to escape the statute of limitations, and I must sustain the demurrer so far as it rests on the grounds number 7a-7e, inclusive.

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[7] The defendants contend that all the acts complained of in the declaration as having injured the Goddu Company's business or property appear from the declaration itself to have been incapable of concealment, and that the amendment to the replication therefore makes the replication inconsistent with the declaration itself. In this I am obliged to think they are right. If their control of the Goddu Company was acquired by buying a majority of its stock after negotiations with certain of its stockholders who owned it, if they thereupon elected officers or directors of the defendant Shoe Machinery Company, including the three individual defendants, to form the entire board of directors of the Goddu Company, and continued them in office at successive elections, and if they stopped the Goddu Company's business and enforced disuse of its patents by exercising the control thus acquired, the supposition that these doings might have been fraudulently concealed does not seem to me entitled to serious consideration. The declaration does not allege that these things [658] were done in secret, and, as has appeared, the latter allegation that they were fraudulently concealed is unsupported by specifications. The plaintiff says that these acts were made unlawful by the purpose of the defendants, in combination, to do the above acts in restraint of trade, and that this purpose, if not disclosed to the trustee, was fraudulently concealed. No doubt it may be assumed that such a purpose, apart from the acts done, would not be disclosed; but, except so far as its existence is established by the alleged acts done, I do not see how it could have afforded this plaintiff any cause of action. The demurrer is sustained so far as it rests upon the ground numbered 7f.

The defendants contend that the amended declaration must be taken to have fully and finally set forth the cause of action, and that, when the plaintiff undertakes to say in his amended replication that the cause of action was fraudulently concealed "in pursuance of the plan and conspiracy" described in the declaration, he so modifies or adds to the description there given as to present a cause of action different in some respects from that therein stated.

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The defendants contend that nothing of this kind can be done in a replication, that the attempt to do it constitutes a "departure" in pleading, and of itself makes the replication bad on demurrer. If the allegation referred to must be understood as setting up another act, planned as part of the combination or conspiracy complained of, and thereafter done by the defendants to the Goddu Company's injury, I think their contention right, and sustain their demurrer on the grounds numbered 3-6, inclusive. If the words quoted need not be so understood, and the declaration seems to me so framed as to leave this subject to some doubt, they are without importance upon the questions raised by this demurrer.

[8] The defendants' motion to strike out the amendment to the replication is based in part upon grounds already considered in dealing with their demurrer. It is also based upon allegations that the facts found or recited in *Converse et al. v. United Shoe Machinery Co.* 185 Mass. 422, 70 N. E. 444, and 209 Mass. 539, 95 N. E. 929, show the existence of the claims upon which the cause of action in this case is based to have been matters of public record, not within the defendants' power to conceal, of which the trustee had ample means of knowledge, and which he could not have failed to know had he exercised due diligence. Although it appears from the above reports of these cases that the first case was decided in 1904, and was brought against the defendants here by minority stockholders of the Goddu Company, for injury to their interest therein, alleged to have been done by the defendants while in control of that company, acquired by conspiracy to obtain such control, also that the second suit, decided in September, 1911, was brought by the same minority stockholders in equity, against the same defendants and the Goddu Company, to redress the same alleged injuries, and upon the claim that the defendants attempted to create a monopoly, I am not satisfied that the reports cited can properly be resorted to, upon a motion of this kind, for the purpose of establishing the conclusion for which the defendants contend. Having sustained the [654] demurrer to the amend-

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ed replication, I shall deny the motion to strike out the amendment.

If the demurrer has been rightly sustained, the defense that the suit is barred by the statute of limitations has not been met. Judgment is, therefore, to be entered for the defendants.

CILLEY v. UNITED SHOE MACHINERY CO.

(District Court, D. Massachusetts. January 31, 1913.)

[202 Fed. Rep., 598.]

PLEADING (§ 64)—DUPLICITY—VIOLATION OF ANTI-TRUST ACT.—Since the thing forbidden by Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), may consist of a scheme or an unlawful combination as a whole, a declaration for civil damages authorized by section 7, charging in a single count that defendant was an illegal combination in restraint of trade, etc., and that by reason of conspiracy and monopoly defendant had practically monopolized the entire business of manufacturing shoe machinery in the United States, and had utterly destroyed plaintiff's interstate trade and commerce in such machinery and rendered plaintiff's patents valueless, etc., was not objectionable for duplicity and uncertainty on the theory that each one of the things forbidden in sections 1 and 2 were distinct offenses, and that the declaration should charge such separate offenses in separate counts.*

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§134-137; Dec. Dig. § 64.]

MONOPOLIES (§ 28)—SHERMAN ACT—VIOLATION—CIVIL DAMAGES—DECLARATION.—A declaration for civil damages for violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), alleged that defendant was, and since its organization had been, an illegal combination in restraint of trade and a monopoly, that each of its leases of machinery, copies of which were annexed, was a contract in restraint of trade and commerce, and that defendant by a created scheme and conspiracy monopolized the entire trade in shoe machinery and had excluded plaintiff from participation therein. It also charged that by reason of such conspiracy and monopoly defendant had prevented plaintiff from selling shoe machinery covered by plaintiff's patents and had re-

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dered the same valueless, etc. *Held*, that the complaint was not demurrable for want of facts.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 18; Dec. Dig. § 28.]

MONOPOLIES (§ 28)—**CIVIL DAMAGES**—**DECLARATION**—**INJURY**.—The declaration sufficiently alleged injury to plaintiff's business and property by reason of defendant's unlawful acts to withstand a demurrer.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 18; Dec. Dig. § 28.]

At Law. Action by Harry E. Cilley against United Shoe Machinery Company. On demurrer to declaration. Overruled.

[599] *Everett N. Curtis*, of Boston, Mass., for plaintiff.

Coolidge & Hight, of Boston, Mass., for defendant.

Court, Circuit Judge.

This case is now before the court on demurrer to the declaration.

The case is an action at law brought under section 7 of the act of Congress of July 2, 1890, known as the Anti-Trust Act (26 Stat. 210, c. 647 [U. S. Comp. St. 1901, p. 8202]).

Section 7 reads as follows:

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The essential averments in a declaration under this section would appear to be: (1) That the defendant has done one or more of the things forbidden by the first and second sections of the statute; (2) that by such action of the defendant the plaintiff has been injured in his business or property; and (3) that damages were sustained. *People's Tobacco Co. v. American Tobacco Co.*, 170 Fed. 396, 407, 95 C. C. A. 566.

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The declaration in the case at bar is limited to a single count in a narrative form. It comprises 13 printed pages, and with the attached exhibits some 69 printed pages. Both the briefs of counsel contain an accurate summary of the declaration, which may be stated as follows:

It alleges in detail the establishment of the shoe machinery business of the plaintiff at Boston in 1893, his engaging thereafter in interstate commerce, his building up of the business, his procuring of patents and the construction of shoe machines thereunder, the expenditure of nearly \$100,000 to develop the business, the profits of the business immediately prior to the alleged wrongful acts of the defendant and the entire loss of profits thereafter, a list of the customers with whom he had done business and persons with whom he was negotiating for further business, the trade conditions prior to the organization of the defendant company, the illegal combination and conspiracy of its promoters, the organization of the company, its acquisition of competing concerns, its utilization of leases and licenses as an instrumentality to create an illegal monopoly and combination (the general forms of leases and licenses being set forth verbatim in an exhibit), the effect of these leases and licenses in excluding the plaintiff from the market, the attempt through the leases and licenses to extend the scope and operation of the defendant company's patents, the superior merit and efficiency of the plaintiff's line of shoe machinery, the threats of the officers of the defendant company to the plaintiff made in pursuance of its scheme to monopolize, the destruction of the established business and interstate commerce of the plaintiff, the diversion of his customers, the destruction of the value of his patent interests, and others injuries to his business and property.

[600] In the two final paragraphs of the declaration the plaintiff thus sums up his cause of action and the damages alleged:

"13. Accordingly, the plaintiff says that the defendant is and has been since its organization an illegal combination in restraint of trade and a monopoly existing wrongfully and in violation of the act of Congress of July 2, 1890, chapter 647, commonly known as the Sherman Act; that each and every one of the leases, copies of which are hereto annexed, is a contract in restraint of trade and commerce

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among the several States and with foreign nations, in that the effect has been to prevent practically all of the shoe manufacturers in the United States from purchasing, leasing, or otherwise acquiring or obtaining in any of the States of the United States or in any foreign market or elsewhere, except from the defendant shoe machinery and mechanisms; that said group or system of leases which the defendant has required and secured to be signed by nearly all the shoe manufacturers in the United States have created and now maintain a conspiracy and combination in restraint of trade and commerce among the several States and with foreign nations, to which the defendant and all its acquired concerns and companies are parties, whereby the defendant has monopolized and now monopolizes substantially the entire trade and commerce in shoe machinery and mechanisms among the several States and with foreign nations and suppresses all competition therein, and has entirely excluded the plaintiff from participation in such trade and commerce; that said leases are essential parts of an illegal scheme, combination, and conspiracy in restraint of trade and commerce, and have been utilized by the defendant as an important instrumentality in creating and supporting its illegal monopoly in the business of dealing in and with shoe machinery and mechanisms.

"14. That through and by reason of the said conspiracy and monopoly acquired by the defendant company of practically the entire business of manufacturing shoe machinery throughout the United States the plaintiff has been prevented from selling shoe machinery manufactured by him, including machines covered by said patents relating thereto enumerated in paragraph 1 to the manufacturers included in Exhibit A and to the other shoe manufacturers in the various States of the United States, and by means of each and all acts done by the defendant in pursuance of said monopoly the defendant has utterly destroyed the interstate trade and commerce of the plaintiff with said shoe manufacturers by the loss of many orders and customers directly resulting therefrom, the interests of the plaintiff in the aforesaid patents enumerated in paragraph 1 have been rendered valueless, and the plaintiff has otherwise been greatly injured in his business and property by reason of said monopoly and the acts of the defendant done in pursuance thereof, and to carry the same into effect, which are declared to be unlawful by the aforesaid act of Congress of July 2, 1890, chapter 647, to the amount of three hundred thousand (\$300,000) dollars, to recover threefold which damages and costs of suit, including a reasonable attorney's fee under section 7 of said act, this suit is brought."

The several grounds of demurrer may be grouped under three heads:

(1) That the declaration is bad for duplicity and uncertainty.

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(2) That the declaration fails to set forth with substantial certainty substantive facts showing that the defendant has been guilty of anything forbidden or declared to be unlawful by the Anti-Trust Act.

(3) That the declaration fails to show that the plaintiff has been injured in his business or property by reason of anything forbidden or declared to be unlawful by this act.

[1] 1. With respect to the first ground of demurrer, it is by no means clear under the recent decisions of the Supreme Court that this declaration is bad for duplicity and uncertainty.

In the construction of this statute the Supreme Court has held that the thing forbidden by the statute may reside in the scheme or combination considered as a whole. In *Swift v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), the court said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

Again, in *United States v. American Tobacco Co.*, 221 U. S. 106, 184, 31 Sup. Ct. 632, 650 (55 L. Ed. 663), the court said:

"Our conclusion being that the combination as a whole, involving all its co-operating or associated parts, in whatever form clothed, constitutes a restraint of trade within the first section, and an attempt to monopolize or a monopolization within the second section of the Anti-Trust Act, it follows," etc.

The defendant's theory of this case is that each one of the things forbidden by sections 1 and 2 are distinct offenses, and that in a civil action brought under section 7 the declaration should charge these separate offenses in separate counts. This theory does not accord with the view taken by the Supreme Court that the thing forbidden by the act may consist of "the scheme as a whole" or "the combination as a whole." Under this construction of the statute it is plain that the separate elements considered by them-

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selves may not be illegal, and yet that the scheme or combination as a whole may be.

The declaration in this case is founded upon the theory that under section 7 the thing "forbidden or declared to be unlawful by this act" may reside in the scheme or combination as a whole, and under the decisions of the Supreme Court I am not prepared to rule that a declaration so framed is void for duplicity and uncertainty.

[2] 2. With respect to the second ground of demurrer, I am not convinced, assuming the truth of all the allegations which are well pleaded, that the declaration does not sufficiently set forth a scheme or combination in restraint of trade within the meaning of sections 1 and 2 of the Sherman Act as construed by the Supreme Court. Since, then, it does not clearly appear that the declaration does not set forth a cause of action, this ground of demurrer should be overruled.

[3] 3. With respect to the third ground of demurrer, I am of the opinion, upon an examination of the declaration, that the allegations therein respecting injuries to the plaintiff's business and property by reason of the defendant's unlawful acts are a sufficient compliance with the statute.

Upon the whole, and notwithstanding that the questions here raised cannot be said to be fully settled or free from doubt, I do not think this demurrer should be sustained.

It is a familiar rule on demurrer that every doubt should be resolved in favor of the plaintiff, and hence a demurrer should not be sustained unless the court is fully satisfied that some of the grounds are well founded.

Demurrer overruled.

BUCKEYE POWDER CO. *v.* E. I. DU PONT DE NEMOURS POWDER CO. ET AL.*

(District Court, D. New Jersey. March 28, 1912.)

[196 Fed. Rep., 514.]

COURTS (§ 841).—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.—

Under the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), a Federal court will follow the practice prescribed by a

* For opinion of the Circuit Court of Appeals (223 Fed. 831), see *post*, page 597.

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State statute "as near as may be," but not where it would defeat or incumber the administration of the law under Federal statutes.*

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 899; Dec. Dig. § 841.]

Conformity of practice in common-law actions to that of State court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 892.]

MONOPOLIES (§ 28)—ANTI-TRUST ACT—ACTIONS FOR DAMAGES—PLEADING.—To sustain an action for damages under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), the plaintiff must allege, as well as prove, that defendant committed one or more of the acts declared to be unlawful by sections 1 and 2, by either entering into a contract, combination, or conspiracy in restraint of interstate or foreign trade or commerce or monopolizing or attempting to monopolize a part of such trade or commerce, and in such clear and unambiguous language and with such reasonable certainty that the defendant and the court may be apprised of the alleged cause of action.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

PLEADING (§ 64)—ANTI-TRUST ACT—ACTIONS FOR DAMAGES—DECLARATION—DUPLICITY.—A declaration in such an action which alleges a conspiracy to monopolize interstate commerce in certain articles is not bad for duplicity because it also alleges the making of contracts and combinations, where they are but steps in such conspiracy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.]

PLEADING (§ 360)—MOTION TO STRIKE OUT.—In disposing of a motion to strike out a declaration as so defective in form as to prejudice a fair trial of the cause, the court will notice and [515] strike out objectionable parts, although not directly challenged, where necessary to a proper disposition of the motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1129-1146; Dec. Dig. § 360.]

PLEADING (§ 355)—MOTION TO STRIKE OUT—GROUNDS.—In an action for damages under Sherman Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), where a conspiracy is charged between a large number of persons and corporations named, only those who are served should be declared against as defendants, and the naming of all as defendants in the declaration, together with general references to the defendants, without specifically naming those referred to, constitutes a defect which will be corrected by the court on a motion to strike out the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1102-1110; Dec. Dig. § 355.]

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MONOPOLIES (§ 28)—ACTION FOR DAMAGES UNDER ANTI-TRUST ACT—PLEADING.—To require the party injured by the conspiracy denounced by Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), to set out his cause of complaint with that degree of nicety and precision in stating times, places, methods, and persons required by the ordinary rules of common-law pleading, would be to nullify the beneficent purpose of the statute, and a declaration will not be stricken out, even though it may contain some statements of a general or indefinite character, if it sets out with reasonable certainty and definiteness the causes which resulted in plaintiff's injury and connects the defendant therewith, any defendant deeming himself prejudiced by any such generality of statement having the right to move for a bill of particulars.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

PLEADING (§ 18)—CERTAINTY—INDEFINITENESS.—The declaration in an action under Anti-Trust Act of July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), to recover damages for violation of sections 1 and 2 of the act, construed, and held not subject to a motion to strike for uncertainty and indefiniteness of statement, but certain allegations stricken out as irrelevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 89, 64; Dec. Dig. § 18.]

At Law. Action by the Buckeye Powder Company against the E. I. Du Pont de Nemours Powder Company and others. On motion to strike out declaration. Overruled.

Frank S. Katzenbach, jr., of Trenton, N. J. (*Robert H. McCarter, George S. Graham, and Thomas J. Laffey*, on the brief), for the rule.

MacFarland, Taylor & Costello, of New York City (*Willard U. Taylor, Twyman O. Abbott, and Walter J. Barnett*, on the brief), contra.

RELLSTAB, District Judge.

The plaintiff has filed his declaration against 28 persons (defendants, so called), and this motion is made on behalf of the E. I. Du Pont de Nemours Powder Company, Eastern Dynamite Company, and International Smokeless Powder & Chemical Company, three of the four defendants who were served [516] with process. The motion is founded

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on section 110 of the New Jersey practice act (P. L. 1908, p. 569), which section is as follows:

"The court or a judge may on four days' notice strike out any pleading which is irregular or defective, or is so framed as to prejudice, embarrass, or delay a fair trial of the action."

The motion takes the place of a special demurrer, deals with the form and not the substance of the pleading, and is addressed to the sound discretion of the court. More strictness is required in stating the substance of a cause of action than the form of it.

[1] The practice here authorized by the State statute, by virtue of section 914, R. S., derived from section 5 of the "conformity act" of June 1, 1872 (chapter 255, 17 Stat. 197 [U. S. Comp. St. 1901, p. 684]), will be followed "as near as may be," but not "where it would be inconsistent with the terms or defeat the purposes of the legislation of Congress. * * * State statutes which defeat or incumber the administration of the law under Federal statutes are not required to be followed in the Federal courts. *Mexican Cen. R. R. Co. v. Pinkney*, 149 U. S. 207, 13 Sup. Ct. 859, 37 L. Ed. 699. It follows that, where the State statute or practice is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the Federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the Federal law." *Hills & Co. v. Hoover*, 220 U. S. 329, 336, 31 Sup. Ct. 402, 55 L. Ed. 485. The motion will not be granted unless it is clear that a fair trial of the action on its merits is prejudiced by the form of the stated cause of action.

[2] The alleged cause of action is said to arise under section 7 of the act entitled, "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, popularly known as the "Sherman Anti-Trust Act" (3 U. S. Comp. Stat. 1901, p. 3200.) Said section is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit

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Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The unlawful things alleged to have been done by the defendants to the injury of the plaintiff are said to be denounced by sections 1 and 2 of such act, which sections are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be [517] punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The first section of this act denounces restraint of interstate trade in two ways—by contract and by a combination or conspiracy—and in the second section the monopolizing and attempt to monopolize any of such trade is denounced. To maintain an action under this act, therefore, the plaintiff must allege as well as prove that the defendant committed one of such forbidden acts, and that in consequence he was injured in his business or property. *Northern Securities Co. v. U. S.*, 193 U. S. 197-403, 24 Sup. Ct. 436, 48 L. Ed. 679; *Rice v. Standard Oil Co.* (C. C.), 134 Fed. 464; *Cilley v. United Shoe Mach. Co.* (C. C.), 152 Fed. 726; *People's Tobacco Co. v. American Tobacco Co.*, 170 Fed. 396-407, 95 C. C. A. 566; *Ware-Kramer Tobacco Co. v. American Tobacco Co.* (C. C.), 180 Fed. 160. In the pleading, plaintiff must declare the forbidden acts and consequent injuries in such clear and unambiguous language, and with such reasonable certainty, that the defendants and the court

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may be apprised of the alleged cause of action, that it may be known by the former how to answer and prepare for trial, and by the latter what is the nature of the issue, and, if it be one of fact, to control the character of the proofs offered at the trial, and to pronounce and enforce a judgment that will settle the rights involved in such issues.

The declaration contains one count composed of 17 lengthy paragraphs, set out in the margin hereof.* Broadly stated, the gravamen of the declaration is that the defendants entered into contracts and combinations and conspiracies to monopolize interstate trade in powder and other explosives, and that in carrying out their monopolistic purposes they conspired to coerce the plaintiff to yield its independence as a competitor and join with the defendants on their terms in the furtherance of such unlawful purpose, or to drive it out of such business, and that they eventually succeeded in accomplishing the latter, to its great damage.

The grounds of the motion to strike out are two: First, duplicity; second, that the allegations are so defective as to prejudice the defense.

[3] As to the charge of duplicity. The defendants contend that the plaintiff has not only combined in one count all three causes for which actions are given by the Anti-Trust Act, but also alleged causes for which actions are not given by such act. Paragraph 4 of such declaration is said to allege the causes of action founded on such act, and paragraphs 5, 14, and 17 the other causes of action. Paragraph 4 does charge the making of unlawful agreements, the entering into unlawful combinations, and the maintenance of a practically complete monopoly. If in so doing the pleader has combined two or more distinct causes of action, the pleading is bad for duplicity. *Rice v. Standard Oil Co.*, *supra*. But as a conspiracy may be accomplished by any number or variety of steps, some of which may be in the form of contracts, others as combinations, if the contracts and the combinations referred to in the declaration are but steps in such conspiracy, and such conspiracy has for its purpose the alleged monopoly, the whole constitutes

* See note at end of case.

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but one cause of action. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033; *United States v. Swift* (D. C.) 188 Fed. 92. The matter of the fourth paragraph relates largely to transactions prior to the plaintiff's engaging in the manufacture and sales of powder, etc. In that respect it is but introductory to, and an underlaying of, the various steps constituting the conspiracy which are said to have followed, and which history is offered as furnishing the light in which such subsequent steps are to be interpreted. This is not objectionable, and may be essential to a right understanding of the cause of action said to arise from the Anti-Trust Act. *United States v. E. I. Du Pont de Nemours* (C. C.) 188 Fed. 127, 134, 151. Out of the matter stated in this paragraph emerges that in the year 1903, the year that the plaintiff engaged in such powder trade, the defendant the E. I. Du Pont de Nemours Powder Company (hereinafter called the New Jersey Company) was incorporated under the laws of the State of New Jersey as a holding company, and to which, it is alleged, was transferred the controlling interest in the capital stock and properties of a large number of (named) corporations which had theretofore been engaged in such trade, including the served defendants, and in it it is alleged that certain (named) individuals erroneously called defendants, as officers and directors of two of the moving defendants, viz., the New Jersey Company and the International Smokeless Powder & Chemical Company, "instituted, directed, ratified, or approved the various unlawful and wrongful acts hereinbefore and hereinafter complained of; * * * that, by reason of the matters and things alleged and set forth in this paragraph, the defendants succeeded in establishing within themselves, and have ever since maintained, a practically complete monopoly in interstate trade in powder and other explosives amounting to about ninety-five (95) per cent of said entire trade, and ever since have been, and now are, engaged in a combination and conspiracy to unreasonably restrain and monopolize said trade throughout the United States and foreign countries, and have suppressed competition and have fixed prices of powder and

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other explosives arbitrarily and unreasonably, and have driven independent competitors out of business, or have coerced them into a sale to or union with said unlawful combination, and have unreasonably restrained trade and commerce among the several States of the United States and with foreign nations, and have committed various other unlawful and wrongful acts as hereinafter set forth, all in contravention of the laws of the United States and particularly the act of Congress of July 2, 1890, and in derogation of the rights of plaintiff to its great damage, as hereinafter set forth." The conspiracy therein alleged against the defendants, and connected with the more or less detailed statement of the various steps subsequently alleged [519] to have been taken in furtherance thereof, constitute but one cause of action.

The fifth paragraph, which, it is said, discloses a cause of action different from that authorized by the Anti-Trust Act, also deals in part with matters of inducement. In this instance, the introductory matter leads up to the incorporation of the plaintiff and the efforts made by its promoter to secure a favorable location for its manufacturing plant. It also sets forth various steps alleged to have been taken by the officers and agents of one of the subsidiary companies of the New Jersey Company to prevent the organization of plaintiff and its engaging in the manufacture and sale of such powder in furtherance of such conspiracy to perpetuate a monopoly in such trade.

The fourteenth paragraph, which, it is contended, also states a different cause of action, alleges that the New Jersey Company, in its purpose to prevent competition, and to secure for itself and its associates a monopoly of the powder trade, entered into a combination to control the output of the manufacturers of high grade powder-making machinery, and succeeded thereby in preventing the plaintiff, except at great cost, from obtaining machinery for the equipment of its plant. Obviously the allegations in each of these paragraphs do not relate to a cause of action other than one of those authorized by such Anti-Trust Act. The illegal acts therein charged are but steps in furtherance of the conspiracy alleged in the other paragraphs of the declaration.

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In the seventeenth paragraph, which, it is said, also alleges a different cause of action, the pleader asserts that it is entitled to recover punitive or vindictive damages by reason of the malicious and wicked acts of the defendants, and particularly those of the New Jersey Company. The right thereto, however, is therein stated to be founded upon the wrongs set forth in the declaration; and, as these wrongs are said to be the mentioned violations of the Anti-Trust Act, the pleader in no sense asserts a cause of action having any other basis. The case of *Ware-Kramer Tobacco Co. v. American Tobacco Co.* (C. C.) 178 Fed. 117, cited by the defendants in support of their contention of duplicity as to the seventeenth paragraph, is not applicable to the case at bar. In that case the declaration contained two counts. The first count was founded upon the Anti-Trust Act; the second, upon a common-law tort. Manifestly in that declaration there were two distinct causes of action. In the cited case the decisive point was not whether a double cause of action was stated in one count, but whether the court had obtained jurisdiction over one of the defendants as to the cause of action stated in the second count. In the case at bar there is no such question. Whatever may be said of the plaintiff's characterization of the conduct of the defendants, and its assertion of its right to recover punitive or vindictive damages by reason thereof, its claim for such damages does not make the declaration bad for duplicity.

The cause of action pleaded throughout the declaration is single, and therefore is not bad for duplicity.

[4] As to the second ground, that the declaration is so defective as [520] to prejudice a fair trial, etc. The declaration is unquestionably irregular and defective on the several matters presently to be noted, and, while the court will not usually interfere with the form of pleading in the absence of objection, yet where, as in this case, the form of stating the alleged cause of action is challenged, the court will exercise its undoubted prerogative to notice unchallenged defects, and expunge the objectionable parts, if necessary to a proper disposition of the motion to strike out the whole declaration.

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[5] As already noted, the declaration is laid against 23 persons (called defendants), 13 of whom are corporations, and 15 individuals. Of these only 4 (corporations) have been brought into court. Only those served should have been declared against as defendants. If the conspiracy embraced others than those served, they could have been mentioned as co-conspirators, but not as defendants. Throughout the declaration the word "defendants" is frequently used, without specifically naming them, and, as by far the larger number of the persons declared against as defendants have not been brought into court, this general reference to defendants is irregular, and is bound to prove embarrassing to both the court and the parties if it is not restricted to the defendants actually served. This irregularity, however, is not sufficient to strike out the entire declaration, if by the exercise of the power of excision the rights of the parties are not infringed. The striking out of the pleading rests in the sound discretion of the court, and the power will be exercised to strike out in whole or in part, as the interests of justice in the particular circumstances require. In the present case such interests require that the names of all the persons mentioned in such declaration as defendants, except the four served, be struck out, so that the pleader's general reference to defendants will be limited to those brought into court.

[6] In support of the ground of irregularity, the moving defendants allege that the averments in paragraphs 4, 6, 7, 8, 9, 10, and 11 are too indefinite and uncertain to apprise the defendants of what they are accused, and that paragraph 13, where not indefinite and uncertain, pleads the evidence. Before taking up these criticisms seriatim, it is to be observed that the pleader has declared that the alleged conspiracy comprises a series of steps carried out in different ways. The pleader in stating them has gone to considerable length, and yet, as will be seen, in many instances has used general terms. But the use of general terms in alleging the character of such steps or some of the methods employed in performing or enforcing them, or the failure to give the names of the persons said to have figured in the furtherance and effectiveness of such conspiracy, does not nec-

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essarily condemn the pleading as irregular or defective. The very nature of a conspiracy suggests secrecy and underhand endeavors. The injurious effects of such will be readily apparent, while a proving of the times and places, plans, methods, and persons employed in consummating the nefarious purpose may be baffling to some of the conspirators themselves.

Defendants rely almost entirely upon *Rice v. Standard Oil Co.*, *supra*, as authority that in the particulars pointed out by them to be [521] presently considered the plaintiff's allegations are too vague and uncertain. In that case the court applied strictly the well-established rules governing common-law pleadings, making no distinction, apparently, between the common-law and statutory rights of action. In view, however, of the decisions of the United States Supreme Court in which this subject matter has been more recently considered, greater liberality than there permitted must be allowed the pleader who founds his cause of action upon the Anti-Trust Act in the form of stating the several steps which in his judgment bring his cause of action within the purview of such act. In *Swift v. United States*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 279, 49 L. Ed. 518, the court by Mr. Justice Holmes, in answering the attack made upon a bill in equity charging a combination in restraint of trade as lacking definiteness and certainty in its statement of alleged violations of the Anti-Trust Act, said:

"A bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read, this bill seems to us intended to allege successive elements of a single connected scheme. * * * The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space that something of the same impossibility applies to them.

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The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. * * * The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme."

Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, was considered by the Supreme Court on complaint and demurrer in an action brought under this act similar to the one at bar, in which the court reiterated its liberal attitude in the matter of pleading an alleged cause of action founded upon the Anti-Trust Act. In *Ware-Kramer Tobacco Co. v. American Tobacco Co.* (C. C.) 178 Fed. 117, on special demurrer to the complaint, in a similar action to the one at bar, and in which a like attack upon the alleged cause of action was made, after a review of the cases which are here cited and others, the court said at page 125 of 178 Fed.:

"The evil at which the statute is aimed is of national importance, and the remedies provided for its punishment and repression should not be restricted by technical and narrow rules of pleading. If the plaintiff in an intelligent way and by 'a connected story' sets forth his grievance, he should not be turned away from the court or his pleading so mutilated by striking out more or less essential averments as to embarrass him and unduly limit the scope of his proof when he comes to trial."

[522] To require the party injured by the conspiracy denounced by the Anti-Trust Act to set out his cause of complaint with that degree of nicety and precision in stating times, places, methods, and persons, as is required in the ordinary common-law pleading, would be to nullify the beneficent purpose of the statute. If the pleader sets out with reasonable certainty and definiteness the causes which resulted to his injury, and connects the defendant therewith, and from such allegations the defendant is apprised of the character of the accusation, and it is not apparent that he will be prejudiced in making his defense, a declaration will not be struck out, even though it may contain some statements of a general and indefinite character, and shall fail to disclose the exact times and places when some of the alleged steps in furtherance of the conspiracy were carried

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on, or the names of all the persons employed therein. If as to such general statements the defendant deems himself entitled to more specific information, he may apply for a bill of particulars in regard thereto; but the right of the plaintiff to have his cause judicially inquired into is not to be made dependent upon his ability to state with exactness each step or each of the several parts of a step which either from the results presumably took place or which he alleges took place. He is not required to allege more than is necessary to be proven, nor is he to be unduly limited in making his allegations of steps taken because at the time of making them he is not in possession of the specific data which at the trial he will find necessary to establish such step, unless such step or steps by the very framework of his pleadings are essential to his cause of action, and it is apparent that without more definite data the defendant will be prejudiced in his defense in meeting such allegation. To insist that the plaintiff insert in his declaration only such steps as would be sufficient to maintain his action would be to unduly limit or skeletonize his pleading, a course apt to prove embarrassing, if not disastrous, at the trial, where the range of evidence may be limited by the paucity of the allegations, and one which would be antagonistic to, rather than co-operative with, the legislative purpose manifested in the Anti-Trust Act.

[7] Turning now to the particular criticisms leveled by the defendants against specified paragraphs, I notice a sufficient variety of the alleged specific infirmities to illustrate the character of the objections. Paragraph 4, as noted under the head of duplicity, avers the making of contracts, the entering into combinations, and effecting a monopoly. It does not set out such agreements, or the names of the competitors injured by such combinations and monopoly. What has been herein said as to the ground of duplicity is applicable here, viz, that this paragraph is in the main introductory to the charge of conspiracy laid by plaintiff against the defendants. The general charge of conspiracy to effect a monopoly and its results contained in this paragraph, standing by itself, perhaps, would be insufficient to withstand the

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attack of vagueness and uncertainty, but it is not intended to furnish the entire cause of action, but only the groundwork and the conditions preliminary thereto; the par-[523] ticular steps and development of the alleged conspiracy being found in the subsequent paragraphs.

Paragraphs 6, 7, and 8 are alleged to be uncertain and indefinite in not apprising of "the methods and devices employed to prevent the plaintiff from acquiring any portion of the powder trade," and in failing to give names, etc. An examination of these paragraphs shows that paragraph 6 avers only matter of inducement relating to trade conditions previous to the incorporation of both the plaintiff and the New Jersey Company, and how the plaintiff availed itself of a favorable location of its plant with reference to freight and transportation facilities, and that paragraphs 7 and 8, after averring that defendants entered into the conspiracy before mentioned to coerce plaintiff, and that the cost thereof was to be apportioned among such defendants ratably, and that the New Jersey Company employed every method and device known to its agents to prevent plaintiff from getting any of the powder trade, to destroy its credit and withdraw from it its customers, and the methods employed for such purpose, conclude with the statement, "as more particularly hereinafter set forth." Obviously, as far as the defendants' allegations of infirmity are concerned, these paragraphs can not be considered alone, but must be read and interpreted in connection with the paragraphs following.

Paragraph 9 avers that the New Jersey Company, "at various times after plaintiff's plant went into operation, employed evilly disposed persons to enter the mines of operators who had made purchases of black blasting powder of plaintiff * * * so as to induce the purchaser to reject the same, * * * and in some instances these methods succeeded, * * * and by reason of such wrongful and wicked conduct certain consignments of powder from plaintiff's mills were from time to time rejected." These allegations are very general, and the subject-matter is one that carries the suggestion that more particular knowledge of

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the dates when and the mines where such occurrences took place, and the customers lost by such methods, is in the possession of the plaintiff than stated. This knowledge, however, can be had on demand for a bill of particulars; and as the plaintiff on the argument hereof, and reiterated in the briefs, offered to furnish greater particulars of any of its averments, if required, defendants will be relieved of any supposed prejudice from the generality of the allegations by taking that course. The further averment in this paragraph that various committees of the miners waited upon the plaintiff, proposing to withdraw their opposition to plaintiff's powder for a consideration, is impertinent and irrelevant to any issue that can be raised in the cause, and should be stricken out. The further averment in this paragraph concerning the mingling of defendant's employés with such miners to induce them to reject plaintiff's powder does not give the names of any such persons. As the names of the defendant's employés ordinarily are more likely to be known by defendants, if such averment accords with the fact, that allegation will not be struck out. The same ruling applies to the failure to name some of the persons in the allegations of the tenth paragraph, where it is charged [524] that the New Jersey Company "on various occasions caused various persons to seek employment with plaintiff for the purpose * * * of obtaining its manufacturing and business secrets, * * * and enlisted the services of employés of various railway companies * * * to furnish reports on all shipments made by plaintiff from its mills, and said information was made use of in various ways to induce said consignees to reject shipments, * * * and in some cases such customers were thereby induced to desert plaintiff and in other cases to reject the shipments already consigned." If the defendants desire more specific data as to the names of the customers and consignees who were so induced to desert the plaintiff or reject purchases of powder, the plaintiff may also in this respect be called upon by a bill of particulars to furnish it. The same course may be taken as to the failure of the pleader in paragraph 11 to give the name of a consumer who was induced to withdraw

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his trade from the plaintiff by means of the methods of the defendant stated in that paragraph.

Paragraph 18 recites an explosion at plaintiff's mills, which, it is alleged, was exaggerated by the New Jersey Company to create a feeling of distrust among plaintiff's customers of its ability to meet future requirements, with the purpose of obtaining its customers, etc. So much of the paragraph as relates to the manner of the explosion and its effect upon the plant and employes is evidential, and in some respects irrelevant in character, but as it may be treated as introductory to the complained of acts of the New Jersey Company in relation to such explosion, and as it can in no way embarrass or prejudice the defendants in their defense it will not be struck out.

Taking the declaration as a whole, it discloses several and various steps alleged to be in furtherance of the conspiracy to prevent legitimate competition in such powder trade. These steps are: Efforts to frustrate the organization of the plaintiff and to prevent it from securing any or a favorable site for its plant; attempts to coerce it into combination with such defendant or to drive it out of business, as by seeking to induce each consumer of the kind of powder manufactured by plaintiff to enter into long-time contracts with defendant to give it the exclusive trade in such powder; to remove such consumers from the open market for a sufficiently long time to prevent plaintiff from getting enough business to run its mills on a profitable basis; that such contracts were obtained sometimes by secret rebates and special prices, by threats to prevent plaintiff's customers from obtaining powder not manufactured by plaintiff, by circulating exaggerated reports of mishaps at plaintiff's mills to create misgiving among its customers of its ability to meet their future requirements; by false statements of the quality of the plaintiff's powder, by threats to discredit its customers' solvency among their creditors, and by offers of financial assistance; that, when such contracts were not made, other coercive steps were taken, such as selling below cost in certain areas to destroy competition while maintaining excessive prices in territory not entered

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by independent companies in order to recoup its losses sustained by such underselling; underselling plaintiff, regardless of price; obtaining by corrupt means confidential information about plaintiff's [525] business and customers; attacking its and its customers' credit by false reports of their solvency; tampering with its processes of manufacture; destroying its property; causing employes in mines where plaintiff's powder was used to refuse to use it; entering into combination with the manufacturers of high-grade powder-making machinery to control their output exclusively with the purpose of preventing plaintiff from obtaining its needed machinery to install and run its powder-making plant.

The declaration in the *Loewe v. Lawlor Case*, set out in full in the margin of the reported opinion, and which was there held to show a case within the statute, is not so different in respect to the generality of many of its allegations from the declaration here considered as to admit of a different finding, if the objections related to its declared cause of action, rather than the form of stating it. While many of the matters that may be considered on a motion to strike out could not be entertained on general demurrer, nevertheless, it can not be held that the allegations herein attacked are so vague and indefinite as to prejudice the defendant in making answer thereto.

The motion to strike out the declaration is denied, but the parts herein specifically condemned as faulty are expunged therefrom without costs to either party.

NOTE.—The following is the declaration referred to in the opinion:

DECLARATION.

Action under Section 7 of Act of Congress of July 2, 1890.

To the Honorable Judges of the Above-Entitled Court:

The E. I. Du Pont de Nemours & Company (a corporation of Delaware), E. I. Du Pont de Nemours Powder Company (a corporation of New Jersey), E. I. Du Pont de Nemours & Company (a corporation of Pennsylvania), Du Pont International Powder Company (a corporation), Delaware Securities Company (a corporation), California Investment Company (a corporation), Delaware Investment Company (a corporation), the Hazard Powder Company (a corpora-

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tion), Laflin & Rand Powder Company (a corporation), Eastern Dynamite Company (a corporation), Fairmont Powder Company (a corporation), International Smokeless Powder & Chemical Company (a corporation), Judson Dynamite & Powder Company of California (a corporation), Alexis I. Du Pont, Alfred I. Du Pont, Eugene Du Pont, Eugene E. Du Pont, Pierre S. Du Pont, Henry F. Du Pont, Irénée Du Pont, Francis I. Du Pont, Thomas Coleman Du Pont, Victor Du Pont, jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M. Barksdale, Edmond G. Buckner, and Frank L. Connable, the defendants in this suit were summoned to answer the Buckeye Powder Company, the plaintiff therein, in an action for damages under the seventh section of the act of Congress of July 2, 1890, known as the "Sherman Act"; and thereupon the plaintiff, by MacFarland, Taylor & Costello, its attorneys, complains as follows, to wit: Whereas

First. That plaintiff is, and has been ever since on or about the 15th day of February, 1903, a corporation duly organized and existing under the laws of the State of Delaware; that the purpose of the incorporation and organization of plaintiff was to carry on the business of manufacturing and selling powder and other explosives, and particularly black blasting powder; that it began such business on or about the 1st day of September, 1903, and continued in and conducted said business down to the 19th day of September, 1903, and during all of said period its business was interstate and conducted in the States of Illinois, Iowa, Indiana, Ohio, Michigan, Minnesota, Missouri, Montana, Kansas, Nebraska, Colorado, Wyoming, West Virginia, and Indian [526] Territory, and the foreign country of Mexico; that during all of said period it manufactured black blasting powder in the State of Illinois for the purpose of selling the same in the States, Territory, and foreign country above mentioned, and the same was sold and delivered to purchasers in said States, Territory, and foreign country.

Second. That the defendant E. I. Du Pont de Nemours & Company is, and has been ever since the 26th day of February, 1902, a corporation organized and existing under the laws of the State of Delaware; that the defendant E. I. Du Pont de Nemours Powder Company is, and has been ever since the 19th day of May, 1903, a corporation organized and existing under the laws of the State of New Jersey; that the defendant E. I. Du Pont de Nemours & Company of Pennsylvania is, and has been ever since the 11th day of September, 1903, a corporation organized and existing under the laws of the State of Pennsylvania; that the Du Pont International Powder Company is, and has been ever since the 14th day of December, 1903, a corporation organized and existing under the laws of the State of Delaware; that the defendant the Delaware Securities Company is, and has been ever since the 20th day of September, 1902, a corporation organized and existing under the laws of the State of Delaware; that

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the California Investment Company is, and has been ever since the 7th day of April, 1903, a corporation organized and existing under the laws of the State of Delaware; that the Delaware Investment Company is, and has been ever since the 20th day of September, 1902, a corporation organized and existing under the laws of the State of Delaware; that the Hazard Powder Company is, and was during the times hereinafter mentioned, a corporation organized and doing business under the laws of the State of Connecticut; that the defendant Laffin & Rand Powder Company is, and was during the times hereinafter mentioned, a corporation organized and doing business under the laws of the State of New York; that the defendant the Eastern Dynamite Company is, and was during the times hereinafter mentioned, a corporation organized and doing business under the laws of the State of New Jersey; that the defendant Fairmont Powder Company is, and was during the times hereinafter mentioned, a corporation organized and existing under the laws of the State of West Virginia; that the defendant the International Smokeless Powder & Chemical Company is, and was during the times hereinafter mentioned, a corporation organized and existing under the laws of the State of New Jersey; that the defendant Judson Dynamite & Powder Company of California is, and was during the times hereinafter mentioned, a corporation organized and existing under the laws of the State of California; and the defendants and each of them are, and were during the times hereinafter mentioned, engaged in interstate trade and commerce in the shipment and sale of gunpowder and other high explosives among the States and Territories of the United States and in foreign countries.

Third. That the individual defendants, Thomas Coleman Du Pont, Pierre S. Du Pont, Alexis I. Du Pont, Alfred I. Du Pont, Eugene Du Pont, Eugene E. Du Pont, Henry F. Du Pont, Irenée Du Pont, Francis I. Du Pont, Victor Du Pont, jr., Arthur J. Moxham, Hamilton M. Barksdale, Edmond G. Buckner, Frank L. Connable, and Jonathan A. Haskell, are and each of them is a citizen and resident of the State and district of Delaware, and said individual defendants, and each of them as officers and directors of the defendants mentioned in the last preceding paragraph, or some of them, have participated in, directed, and managed their affairs in the conduct of the interstate trade aforesaid.

Fourth. Plaintiff shows that for a long time previous to the year 1902, to wit, for a period of more than 30 years and by means of many agreements and the adoption of many forms, certain manufacturers and vendors of powder and other explosives in the United States and foreign countries, including some of the defendants above mentioned, had attempted to establish, and in a measure had succeeded in establishing, a more or less complete monopoly of said trade in their own hands; that by forcing their competitors out of business or coercing them into a union with them, by imposing fines

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and penalties for violation of said agreements to monopolize [527] said trade, by limiting the output of the various parties to said agreements, by apportioning the share of business among the said parties, and by dividing the said trade among themselves, by fixing the prices of said powder and other explosives arbitrarily and not according to any law of supply and demand, the said manufacturers and vendors became and continued to be an unlawful combination for the purpose of restraining interstate trade and commerce within the United States and foreign countries; that on or about the 9th day of February, 1902, the defendants Thomas Coleman Du Pont and Pierre S. Du Pont, with the intent and purpose of securing a more complete monopoly and a more effective control of the powder trade in the United States and foreign countries, caused the defendant E. I. Du Pont de Nemours & Company to be organized under the laws of the State of Delaware as a corporation under the name of the E. I. Du Pont de Nemours Company (which name was subsequently changed to the name now borne by said defendant): and thereupon the said defendant E. I. Du Pont de Nemours & Company entered upon the policy of securing the actual physical or legal control and ownership of all the plants, manufactories, and tangible property theretofore partially controlled by them, or, theretofore co-operating with them, to monopolize the powder trade aforesaid, and to vest the absolute ownership thereof in said E. I. Du Pont de Nemours & Company and to dissolve and destroy their entity, so that there could not be any interference with the plans of said defendant to completely monopolize the powder trade in the United States and foreign countries; that in pursuance of said policy and purpose the said defendant E. I. Du Pont de Nemours & Company thereafter succeeded in absorbing or acquiring control of a large number of said plants, manufactories, and tangible property and of the corporations owning and operating the same. And plaintiff further shows that notwithstanding the success of said defendant E. I. Du Pont de Nemours & Company in its efforts to monopolize the said trade, not being satisfied with the completeness of its monopoly, and seeking to make said control absolute, on the 19th day of May, 1903, caused the defendant E. I. Du Pont de Nemours Powder Company, to be organized under the laws of the State of New Jersey with a capital stock of fifty million (\$50,000,000) dollars to act as a holding company of the various properties, manufactories, and plants which had already been or might thereafter be acquired by it; and thereupon the said defendant E. I. Du Pont de Nemours & Company, in consideration of the issuance to it of thirty million two hundred thousand (\$30,200,000) dollars par value of the capital stock of the said E. I. Du Pont de Nemours Powder Company, sold, assigned, and transferred to said E. I. Du Pont de Nemours Powder Company, all the right, title, and interest which it possessed in or to any of the plants, manufactories, or properties hitherto acquired by it, and

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thereby placed within the absolute control of the said E. I. Du Pont de Nemours Powder Company the property, plants, and manufactories and the business of the following-named corporations, and thereupon caused said corporations to be dissolved and destroyed and removed from the business of manufacturing and selling powder and other explosives, to wit: Blue Ridge Powder Company, U. S. Dynamite Company, Laffin Powder Manufacturing Company, Hudson River Powder Company, Acme Powder Company, Columbia Powder Company, Dittmar Powder & Chemical Company, Mr. Wolf Dynamite Company, Rock Glycerine Company, Sterling Dynamite Company, Atlantic Dynamite Company of New Jersey, Atlantic Dynamite Company of New York, Hecla Dynamite Company, Hercules Powder Company, Repauno Chemical Company, Repauno Manufacturing Company, Clinton Dynamite Company, A. Kirk & Son Company, Robina Fuse Company, Weldy Dynamite Company, Oliver Dynamite Company, Monarch Powder Company, Forcite Powder Company of New Jersey, Forcite Powder Company of New York, New York Powder Company of New Jersey, New York Powder Company of New York, Electric Powder Company, Joplin Powder Company, Shenandoah Powder Company, Brooklyn Glycerine Manufacturing and Refining Company, Pennsylvania Torpedo Company, A. S. Speece Powder Manufacturing Company, Giant Manufacturing Company, Standard Exporting Company, Limited, Metropolitan Powder Company, Climax Powder Manufacturing Company, Explosives Supply Company, [523] American Stor. and Deliv. Company, Atlantic Manufacturing Company, Hudson River Wood Pulp Manufacturing Company, National Torpedo Company, Producers' Powder Company, Chattanooga Powder Company, Lake Superior Powder Company, Ohio Powder Company, American Forcite Powder Manufacturing Company, Hecla Powder Company, Anthracite Powder Company, Globe Powder Company, Marcellus Powder Company, H. Julius Smith Electric Fuse Company, James Macbeth & Co., Phoenix Powder Manufacturing Company, Conemaugh Powder Company, Enterprise High Explosive Company, Schaghticoke Powder Company, California Vig Powder Company, California Powder Works, Western Torpedo Company, Oliver Powder Company, Thompson Torpedo Company, E. I. Du Pont Company, King Mercantile Company, and Mahoning Powder Company; and thereupon the said E. I. Du Pont de Nemours Powder Company became possessed of a controlling interest in the capital stock of each of the defendants herein, to wit: Hazard Powder Company, the Laffin & Rand Powder Company, the Eastern Dynamite Company, the Fairmont Powder Company, the International Smokeless Powder & Chemical Company, the Judson Dynamite & Powder Company, the Delaware Securities Company, the Delaware Investment Company, the California Investment Company, the E. I. Du Pont de Nemours Company of Pennsylvania, and the International Powder Company. And plaintiff further shows that the defendants

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Thomas Coleman Du Pont, Pierre S. Du Pont, Alexis I. Du Pont, Alfred I. Du Pont, Eugene Du Pont, Eugene E. Du Pont, Henry F. Du Pont, Irenée Du Pont, Francis I. Du Pont, Victor Du Pont, jr., Jonathan A. Haskell, Arthur J. Moxham, Hamilton M. Barksdale, and Frank L. Connable, as officers and directors of the said defendants E. I. Du Pont de Nemours & Company, and E. I. Du Pont de Nemours Powder Company, and the defendant International Smokeless Powder & Chemical Company, or one of them, and the defendant Edmond G. Buckner, as a director of the said defendant International Smokeless Powder & Chemical Company, and each and all of them, have instituted, directed, ratified, or approved of the various unlawful and wrongful acts hereinbefore and hereinafter complained of. And plaintiff further shows that by reason of the matters and things alleged and set forth in this paragraph the defendants succeeded in establishing within themselves, and have ever since maintained, a practically complete monopoly in interstate trade in powder and other explosives amounting to about ninety-five per cent (95%) of said entire trade, and ever since have been and now are engaged in a combination and conspiracy to unreasonably restrain and monopolize said trade throughout the United States and foreign countries, and have suppressed competition, and have fixed prices of powder and other explosives arbitrarily and unreasonably, and have driven independent competitors out of business, or have coerced them into a sale to or union with said unlawful combination, and have unreasonably restrained trade and commerce among the several States of the United States and with foreign nations, and have committed various other unlawful and wrongful acts as hereinafter set forth, all in contravention of the laws of the United States and particularly the act of Congress of July 2, 1890, and in derogation of the rights of plaintiff, to its great damage, as hereinafter set forth.

Fifth. Plaintiff shows that, a short time previous to the date when plaintiff was incorporated and organized as hereinbefore set forth, one R. S. Waddell, who afterwards became its president and general manager, conceived the idea of organizing, and afterwards perfected the organization, of plaintiff for the purpose of entering into the business of the manufacture and sale of black blasting powder, and his active experience and acquaintance with the powder trade in the United States and foreign countries for a period of more than 30 years enabled him to determine with scientific accuracy the best and most practical field for successful operation of a plant with which to conduct such business; that the defendants well knew of the experience and ability of said Waddell as a powder expert and salesman, and well knew that his acquaintance with the powder trade was wide and accurate; that as soon as the said defendants became aware of the purpose of the said Waddell to organize plaintiff and engage in the manufacture and sale of black blasting powder, and with the intent and purpose [529] to perpetuate the monopoly

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which they had already acquired as aforesaid, entered into a conspiracy to prevent him from carrying out his said purpose, and the officers and agents of the defendant E. I. Du Pont de Nemours & Company endeavored to dissuade the said Waddell from carrying out his said purpose, failing in which they then offered to join him in conducting said business upon the condition that he would place the said defendant E. I. Du Pont de Nemours & Company in control of said plaintiff's business and affairs, and failing to obtain the consent of the said Waddell thereto, the said officers and agents then endeavored to influence him to cause the plant of the plaintiff to be located in a sparsely settled region, where the development of the market for black blasting powder had been comparatively slow and not of sufficient consequence to justify the hope of prosperous returns. Finding that the said Waddell could not be moved in his purpose to select a location and site for the plant and mills at a point where the powder trade was already largely developed and rapidly developing, the said officers and agents thereupon immediately formed a plan to prevent him from carrying out his purpose of organizing your plaintiff and engaging in the business of manufacturing and selling powder and other explosives, thus planning to retain the monopoly of said trade, and with this end in view they placed detectives on the track of the said Waddell to shadow him throughout the United States as he should journey from place to place in search of a location, to keep them advised of his movements, and to enable them through their emissaries to forestall him in obtaining a location, and to create opposition to the location of plaintiff's plant in such place as might be decided upon, by instilling fear into the minds of the people thereabout, and also, if need be, by entering into competition with the plaintiff for the purchase of sites and bidding up the price of said property, not, however, with any purpose to make use of the same themselves, but to prevent the entrance of an independent competitor for the powder trade in the States, Territory, and foreign country aforesaid, and with a view of altogether preventing plaintiff from finding a site for its mills and plant; that by reason of the matters and things set forth in this paragraph the said Waddell was compelled to travel from place to place with great secrecy, and sometimes under assumed names, and to adopt various disguises to avoid being interfered with, and the said Waddell was thereby compelled to spend much time and money in an effort to avoid the unjustifiable surveillance to which the said defendants subjected him while in the pursuit of a lawful calling and while engaged in the rightful exercise of the privileges guaranteed to citizens of the United States by the laws of the land.

Sixth. Plaintiff shows that, by reason of the dangerous nature of powder and other explosives, the matter of freight rates and transportation facilities are important and often controlling factors in determining the price or prices at which the same can be delivered to

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the consumer profitably and economically; and for this reason the powder trade of the United States and adjoining countries, if left free to adjust itself naturally, would tend to the establishment of many local plants and to active competition between manufacturers, and would thereby result in great benefit to the consumer, and would thereby tend to maintain prices at such figures as would produce reasonable and living profits to the manufacturer; that this is particularly true of black blasting powder, which is most commonly used in coal mining operations; that long experience has demonstrated that one pound of such powder will be consumed on the average to each ton of coal mined. Plaintiff further shows that by reason of the matters and things set forth in this paragraph, and by reason of the fact that there was previous to the year 1903 a great extension of coal mining operations and a large and rapidly developing trade in black blasting powder in the States of Illinois, Iowa, Indiana, Ohio, Michigan, Minnesota, Missouri, Montana, Kansas, Nebraska, Colorado, Wyoming, West Virginia, and Indian Territory, and the foreign country of Mexico, the promoters of the business in which plaintiff was organized to engage, with the intent and purpose to supply a natural market and demand and to conduct a legitimate and profitable business in the manufacture and sale of black blasting powder, selected a point near the city of Peoria, State of Illinois, as the most favorable location for its plant and [580] mills and constructed the same at said point; that said city of Peoria was at said time and ever since has been favorably situated with respect to railroad facilities and transportation, and has had and still has the benefit of favorable freight rates due to competitive transportation conditions; that, by reason of the superior transportation facilities and freight rates thus afforded, plaintiff was assured of a vast market for its product as aforesaid. And plaintiff further shows that the natural and normal increase of the consumption of black blasting powder in said States, Territory, and foreign country, for a long time previous to the location and construction of its said plant and mills, was much more than sufficient to have absorbed the entire output thereof, working at their full capacity, without diverting any of the trade already established from the usual channels of supply and without disturbing any existing business of any other manufacturer thereof.

Seventh. Plaintiff shows that by reason of the favorable location of its mills and plant as hereinbefore alleged, and by reason of the superior facilities of transportation and freight rates afforded thereby, it was able to meet the requirements of consumers of black blasting powder in the States, territory, and foreign country above mentioned, at the lowest price at which the same could be made and supplied and leave a fair and living profit; that it was willing and able to engage in fair and open competition for the said trade with any other manufacturer or manufacturers of black blasting powder;

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that defendants, well knowing this fact, but being desirous to prevent fair and open competition, or in fact any competition at all, and with the design and intent to coerce plaintiff into a combination with said defendants, or to drive it out of business, and thereby stifle competition in said district, entered into a conspiracy with each other, whereby all the other defendants except the E. I. Du Pont de Nemours Powder Company agreed to retire from the business of supplying or competing for the trade in said States, territory, or foreign country, and thus leave the said E. I. Du Pont de Nemours Powder Company a clear field to carry on a war of extermination against plaintiff and drive it out of business; and in pursuance of said agreement and as part thereof an arrangement was made between said conspirators whereby all losses were to be apportioned among them ratably, and whereby the said defendant E. I. Du Pont de Nemours Powder Company should be compensated for all losses which it might incur or suffer in carrying on such war of extermination. Thereupon the said defendant E. I. Du Pont de Nemours Powder Company appointed a committee (known and designated as "the Peoria Committee") to have charge of and conduct said fight against plaintiff, and in further pursuance of said arrangement, for the purpose of enabling the defendant E. I. Du Pont de Nemours Powder Company to conduct a more effective campaign against your petitioner, all of the other defendants withdrew their agencies from said city of Peoria and ceased all effort to secure any of the trade in black blasting powder for themselves within said States, territory, and foreign country, taking in lieu thereof certain allotments of trade elsewhere to compensate them for the trade thus yielded; that thereupon the said defendant E. I. Du Pont de Nemours Powder Company began and continued a most determined, bitter, and disastrous warfare against plaintiff to destroy its business and prevent it from acquiring any new business and to drive it out of business entirely, as more particularly hereinafter set forth.

Eighth. Plaintiff further shows that the defendant E. I. Du Pont de Nemours Powder Company instituted shortly after the organization of said company, and maintained and still maintains as a part of its organization for the more effective prevention and suppression of competition, a department or bureau known as the "Bureau of Information" (sometimes called "Trade reports Bureau"); that the headquarters of said bureau was established and has since been kept at the head office of said defendant in the city of Wilmington, Delaware; that said bureau has maintained and still maintains a system of agents, emissaries, spies, and detectives throughout the various States and Territories of the United States and in some foreign countries for the purpose of collecting and reporting all facts, rumors, and information of every kind concerning the trade in powder and other explosives, and concerning the various consumers and manufacturers of the [531] same; that said agents, emissaries, spies, and detec-

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tives are from time to time instructed and required to collect such facts, rumors, and information in any manner which they may deem necessary for that purpose and without regard to the means employed; that by reason of said instructions and requirements the said agents, emissaries, spies, and detectives have resorted to various questionable and corrupt practices for the purpose of obtaining such facts, rumors, and information, and said defendant has thereby built up and maintained a system of espionage upon the business and private affairs of persons, corporations, and associations engaged in legitimate occupations throughout the United States and foreign countries entirely at variance with the genius of the Government of the United States and in contravention of the statutes and laws of the land; that from time to time a vast amount of facts, rumors, and other information has been collected and forwarded to said bureau of information, and the same has been tabulated and arranged into three divisions, designated as white, yellow, and red divisions; that the white division contains reports concerning consumers and manufacturers who are classed as loyal to the said defendant E. I. Du Pont de Nemours Powder Company and whose loyalty may be depended upon under all circumstances; that the yellow division contains reports of consumers and manufacturers who are considered as friendly to said defendant, but untrustworthy, and whose movements must be watched, and who must be dealt with as the circumstances may seem to require from time to time, and who are kept under close surveillance and espionage to prevent the loss of their trade, support, and cooperation; that the red division contains reports of consumers and manufacturers known to be independent, and who are ready and willing at all times to enter the open market and encourage competition in the powder trade, and who are therefore classed as enemies to said defendant and dangerous to its monopoly, and who are marked for the most vigorous methods which can be brought to bear to coerce them into a union with the defendants or to completely drive them out of business, and the agents, emissaries, spies, and detectives of the E. I. Du Pont de Nemours Powder Company are required to increase their vigilance and espionage and seize upon every opportunity to annoy, embarrass, and injure them in such business; and for this purpose such agents, emissaries, spies, and detectives are authorized to stir up strife between employers and employees, to encourage creditors to institute legal proceedings, to create false and malicious rumors concerning their solvency, and generally do any and every thing which would tend to discredit and embarrass them, and to make full reports of all such false and fictitious conditions thus sedulously and wickedly created by themselves; that it has long been the practice with said bureau of information to select certain facts, rumors, and other information and spread them broadcast among the powder trade, where they would produce the greatest damage to such consumers and manufac-

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turers included within the class known as the red division, in order to force them to ally themselves with said defendant and co-operate with it in maintaining its monopolistic control of the powder trade or drive them out of business entirely. And plaintiff further shows that plaintiff and its customers were classed by said bureau with the division known as the red division, and that every method and device known to the said bureau and its agents, emissaries, spies, and detectives was employed to prevent it from acquiring any portion of the powder trade and to prevent consumers of black blasting powder from purchasing the same from it, and to induce its customers to abandon it, and to injure and destroy its credit by creating distrust among its creditors, and by circulating false and malicious rumors regarding its solvency, and by circulating false and malicious statements concerning the quality of the powder manufactured by petitioner, and by stirring up strife between miners and operators, thereby to induce said miners to refuse to use the powder manufactured by plaintiff, and by circulating false and malicious reports concerning the solvency of customers of the plaintiff, for the purpose of embarrassing them among their creditors and forcing them to abandon plaintiff, and by secretly sending its emissaries and spies into plaintiff's mills and plant to learn the secrets of its business and tampering with its processes, and to destroy its buildings [582] and machinery, and by employing the agents of various transportation companies to furnish information of the consignments from plaintiff's mills and the names and addresses of the consignees, and thereafter inducing said consignees to reject said consignments by offering to furnish them black blasting powder below the price contracted with the plaintiff, and below any price which plaintiff might see fit to offer, and below the actual cost of said powder if necessary to secure said trade, all as more particularly hereinafter set forth.

Ninth. Plaintiff shows that there was, during the period while plaintiff was engaged in the manufacture and sale of powder, an association known as the "Coal Operators' Association," composed of the owners and operators of coal mines in the State of Illinois and other States, and another association known as the "Miners' Union," composed of miners engaged in mining said mines; that annually, or as often as might appear to be necessary, an agreement was regularly entered into between said associations to the effect that the members of the Operators' Association should originally purchase all powder necessary to be used in the mining operations to be carried on in all mines owned or operated by them, and that the members of the Miners' Union would buy of the operators all the powder used by them in performing the work in such mines, at the agreed price of one dollar and seventy-five cents (\$1.75) per keg; that said price was fixed and unchangeable during the life of said agreement, regardless of the prices at which the operators might be able to purchase said powder; that these agreements have sometimes produced

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discord between the members of the two associations, and have sometimes led to claims of injustice on the part of the miners against the operators by reason of the variation in the prices at which the operators may have been enabled to purchase the powder from the manufacturer. And plaintiff shows that the defendant E. I. Du Pont de Nemours Powder Company, at various times after plaintiff's plant went into operation, employed evilly disposed persons to enter the mines of operators who had made purchases of black blasting powder of plaintiff, for the purpose of stirring up discontent among the miners and to instill into their minds prejudice against said powder, and to cause them to refuse to use the same, so as to induce the purchaser to reject the same, intending and planning thereby to secure to itself the business of said operators; and in some instances these methods succeeded in producing boycotts by said miners against the powder manufactured by plaintiff, and by reason of such wrongful and wicked conduct certain consignments of powder from plaintiff's mills were from time to time rejected and returned, and further purchases were discontinued through fear of causing disagreements and disturbances which would lead to shut-downs and idleness. Plaintiff further shows that such a condition was the more easily created by reason of the fact that the Miners' Union always reserved the right under said agreements to select the grade and make of powder which the operator was bound to purchase; and in order to foment unjust opposition and strife, certain persons were employed by said defendant E. I. Du Pont de Nemours Powder Company to travel from place to place and mingle with the miners of the various coal mines to insidiously induce them to believe that it was for their interest to reject the powder manufactured by the plaintiff, and certain influential miners were employed to make use of their influence with their fellow workmen to induce them to boycott such powder; that in some cases intoxicating liquors were distributed among said miners, sometimes clothing, food, and household articles were distributed among said miners and their families, and sometimes cash was paid to various of said miners to obtain their co-operation and influence with their fellow workmen as aforesaid; that these methods were sometimes carried to such an extent as to become open and public scandals, and from time to time various committees of said miners waited upon the officials of plaintiff with propositions to desist in their opposition if plaintiff would increase the compensation which they were already receiving from said defendant, its agents, and emissaries; that by reason of the matters and things alleged in this paragraph the good order and peace of the community was disturbed and set at naught, and the morals of said employes corrupted, and the coal mining business of said [§§§] operators was disturbed, and serious loss was occasioned and threatened to them, and the said operators almost invariably yielded to the demands thus fictitiously created and refused to make further purchases from plaintiff.

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Tenth. Plaintiff shows that the defendant E. I. Du Pont de Nemours Powder Company on various occasions caused various persons to seek employment with plaintiff for the purpose of entering its mills and plant and obtaining its manufacturing and business secrets, and plaintiff, being ignorant of the purpose of said persons in seeking employment and not suspecting their duplicity and fraud, and being desirous of obtaining their services, gave employment to some of such persons, and particularly to one Colburn, who was employed as a competent and trustworthy person to act as superintendent of its plant and mills; that subsequently plaintiff ascertained that said Colburn prepared frequent reports of its business, and of the various processes used by it, and of the amount of powder manufactured and shipped by it, and of the names and addresses of the consignees, all of which were regularly transmitted to the defendant E. I. Du Pont de Nemours Powder Company at Wilmington, Delaware; and in other instances the said defendant E. I. Du Pont de Nemours Powder Company succeeded in enlisting the services of employes of various railway companies receiving powder from plaintiff for transportation to its customers (particularly certain employes of the Chicago, Burlington & Quincy Railroad Company) to furnish said defendant with daily telegraphic reports of all shipments made by plaintiff from its mills and passing through their hands; that sometimes in consideration of said services said defendant agreed to pay and did pay said railway employes one dollar (\$1) for each telegram and five dollars (\$5) for each letter sent to the said defendant or any of its agents or emissaries and carrying any such information; and said defendant agreed to and did pay others of said employes various sums of money by way of salary. And plaintiff further shows that immediately, and continuously for a long period of time, the information so obtained was made use of by the said E. I. Du Pont de Nemours Powder Company in various ways to induce said consignees to reject shipments from, and to abandon, plaintiff and thereafter to purchase black blasting powder of said defendant exclusively, and in some cases such customers were thereby induced to desert plaintiff, and in other cases to reject the shipment already consigned.

Eleventh. Plaintiff shows that the said E. I. Du Pont de Nemours Powder Company, as a part of its plan to create and maintain a monopoly in the powder trade of the United States and foreign countries, and intending to ruin plaintiff and drive it out of business, sought to make it impossible for plaintiff to secure any trade whatsoever in said States, Territory, or foreign country by inducing each consumer of black blasting powder therein to enter into a secret contract with said defendant whereby said consumer bound himself to give the said defendant his exclusive trade in said powder for a term of years, varying from one to five years; that said contracts were secured sometimes by promises of special privileges and prior right over other persons for delivery, sometimes by threats to de-

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prive such consumer of the right to purchase other grades of powder and explosives not manufactured by the plaintiff, sometimes by misrepresenting the capacity of plaintiff's mills and plant, sometimes by circulating false and damaging statements through its agents and emissaries concerning accidents at plaintiff's mills and plant, sometimes by false and malicious statements concerning the quality of plaintiff's powder, sometimes by threats to discredit such consumer's solvency among his creditors, sometimes by offers of financial assistance to such consumers, sometimes by stirring up strife among the employees of such consumer as hereinbefore alleged, and by various other unlawful and wicked conduct. And plaintiff further shows that the terms of said contracts, and even the existence thereof, were in all cases made strictly confidential, for the reason that the said defendant well knew that said contracts were unjust, unfair, unlawful, and that they were especially contrary to the act of Congress known as the "Sherman Act," and made in defiance of said act and with deliberate purpose to evade its provisions; that said contracts provided for secret rebates based upon a schedule of the amount of powder purchased annually as follows, to wit: A purchase of more than five hundred (500) and less than one thousand (1,000) kegs annually entitled the purchaser to a rebate of five (5) cents per keg; more than one thousand (1,000) and less than twenty-five hundred (2,500) kegs, a rebate of ten (10) cents per keg; more than twenty-five hundred (2,500) and less than five thousand (5,000) kegs, a rebate of fifteen (15) cents per keg; more than five thousand (5,000) and less than ten thousand (10,000) kegs, a rebate of seventeen and one-half (17½) cents per keg; more than ten thousand (10,000) and less than twenty-five thousand (25,000) kegs, a rebate of twenty (20) cents per keg; over twenty-five thousand (25,000) kegs, a rebate of twenty-two and one-half (22½) cents per keg. And plaintiff further shows that in cases where the consumer could not be induced to contract as aforesaid, a "special cut price" was issued for his benefit, of which he was permitted to take advantage at any time he desired, to the same effect as if he had signed such contract, and by reason of the fact that such special price was far below a fair and living price for said powder and did not afford a fair profit therefor, or in fact any profit whatsoever, it was impossible for plaintiff to compete for the trade of such consumer, and his trade went to said defendant as effectively as if covered by a formal contract. And plaintiff further shows that in those cases where a customer was already under contract with the said defendant at the time when plaintiff began business, the said defendant, realizing the insufficiency of said contracts to bind said consumer lawfully, and in order to forestall plaintiff in its efforts to secure the trade of said consumer in open and free competition, voluntarily increased the secret rebates specified therein and made such increases effective immediately and to continue for the unexpired term of the contract, upon the condition

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that said exclusive contract should and would be extended and continued at its expiration for a further term of years; that the amount of the rebate and the increase of rebate was not regulated or determined by any law of supply and demand but was determined solely by the necessity of making a price which would be sufficient to induce the consumer to give all his trade to the said defendant and take him out of the open market for a long period of time, at least until plaintiff had been coerced into submission or forced to retire from business; that said defendant was able to, and in some cases did, contract to supply said powder at less than the actual cost thereof, without any regard whatsoever to a fair and living profit or any profit thereon, which said defendant was enabled to do by reason of the fact that all losses which it might thereby sustain should and would be apportioned among and made up to it pro rata by the other defendants herein.

Twelfth. Plaintiff shows that, in furtherance of the purpose of the defendants to monopolize and control the trade of powder and other explosives, the defendant E. I. Du Pont de Nemours Powder Company, shortly after its incorporation created a board, known as the "Sales Board" and composed of a director of sales and assistant directors, who exercised the power to fix prices and establish policies which all the other defendants and parties to the unlawful combination and conspiracy were compelled to observe; that no regular or fixed price list was issued, but the prices which were established from time to time were purely arbitrary; that in those States, Territories, or foreign countries where the defendants were in full control of the powder trade such prices were always fixed so as to leave substantial and sometimes excessive margins of profit, but that in those States, Territories, and foreign countries where the defendants or some of them were conducting business in competition, or in danger of competition, such prices were regulated and determined solely with the object in view of preventing all manufacturers not parties to the conspiracy from obtaining a fair proportion or any of the powder trade, and not with a view of obtaining business for itself at a fair margin of profit, so that said defendant might have a clear field to make any prices it should thereafter see fit, and without regard to the interest of the consumer. And plaintiff further shows that for a period of more than five years it was continuously forced to meet the prices thus fixed by said defendant in an endeavor to obtain and retain enough business to keep its mills and plant operating and to obtain its fair share of the powder trade in said States, Territory, and foreign country; but plaintiff was unable to offer to supply such powder at any [585] price below which said defendant would not go, and wherever and whenever the business of the consumer was submitted for bid, or to competition, in almost every case the said defendant would underbid plaintiff by persistently reducing its price at from five to ten cents per keg, and thus not only depriving

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plaintiff of said business, but sometimes making sales at an actual loss; that in this manner plaintiff would ultimately be compelled to surrender the business of such consumer and leave the said defendant a clear field to make up its losses by fixing any price it might thereafter see fit; and by reason of the matters and things alleged in this paragraph plaintiff suffered irreparable losses, not only in the loss of the fair profits which would have come to it from each contract which it was thus prevented from securing, but from the extension of its business so as to keep its mills and plant continuously operating. And plaintiff further shows that the said defendant E. I. Du Pont de Nemours Powder Company, in pursuance of the policy and practices in this paragraph set forth, has in most cases ultimately succeeded in inducing the purchasers of black blasting powder to enter into contracts with it for a period of years according to the tenor and effect hereinbefore in the last preceding paragraph set forth, and has thereby gradually removed the danger of competition in the powder trade in said States, Territory, and foreign country by absorbing more than ninety-five per cent thereof.

Thirteenth. Plaintiff shows that on or about the 10th day of January, 1904, an explosion occurred at its said plant and mills whereby a large part thereof was totally destroyed, entailing a heavy direct loss upon the plaintiff on account of the destruction of said property, and further serious losses on account of the enforced idleness of the remainder of said plant and mills during the time required for rebuilding; and your plaintiff further shows that said explosion occurred in this wise, namely: During the noon hour on said day, while the employees who had been assigned to work in that portion of said plant which was destroyed were absent therefrom at luncheon, some person or persons unknown to plaintiff entered the said building and distributed matches which had been previously colored with black ink along the floor and walks where powder dust had settled, and where they would ignite if stepped upon; that upon the return of said employees they immediately discovered that the doors to said buildings had been opened, and upon entering also discovered some of the matches distributed as aforesaid; that immediately upon the matter being reported to the official in charge of said buildings, instructions were given to the said employees to remove their shoes and make a careful search for said matches upon their hands and knees; that while thus engaged an explosion occurred, and two of said employees were killed and others seriously injured. And plaintiff further shows that immediately after said explosion the agents of said defendant caused to be printed and distributed among its own and plaintiff's customers large numbers of exaggerated reports of the extent of the damage done by said explosion, and endeavored to create a feeling of uncertainty among consumers generally, and among plaintiff's customers in particular, concerning plaintiff's ability to meet their future requirements for black blasting powder, with a

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view to inducing, and in some cases thereby succeeded in inducing, said consumers to enter into exclusive contracts with said defendant to supply them with black blasting powder, said contracts being of the tenor and effect hereinbefore in paragraph eleventh particularly set forth.

Fourteenth. Plaintiff shows that the defendant E. I. Du Pont de Nemours Powder Company, in order to forestall and prevent the construction of powder mills throughout the United States and foreign countries, and to prevent competition, and with the purpose of securing to itself and its associates in said unlawful combination and conspiracy to monopolize the powder trade, further conspired, combined, confederated, and agreed to and with various persons, corporations, and associations engaged in the manufacture of powder-making machinery for the purpose of obtaining the exclusive use and control of powder-making machinery, and thereby to limit the sale and use of such machinery to themselves and their associates; and by threatening to refuse to purchase powder-making machinery of any maker who would not give it and them such exclusive right the said E. I. Du Pont de Nemours Powder [536] Company succeeded in intimidating many powder machinery makers, and thereby induced them to refuse to sell such machinery to any person, corporation, or association not a party to the said combination and conspiracy. And plaintiff shows that at the time when plaintiff decided upon the construction of its plant as aforesaid, plaintiff sought to purchase the necessary machinery for use in said plant from various manufacturers of high-grade powder-making machinery, to wit: The Prox-Brinkman Manufacturing Company, of Terre Haute, Indiana, and Olin Scott of Bennington, Vermont, and I. & E. Greenwald Co., of Cincinnati, Ohio, and others; that at the behest of the said defendant E. I. Du Pont de Nemours Powder Company, and in pursuance of said unlawful agreement, said manufacturers declined to supply such machinery to plaintiff upon the ground that the said defendants had insisted generally, and particularly in the case of plaintiff, upon a strict compliance with the terms of the said agreement, under penalty of the loss of future patronage of the said defendant and its associates in said combination and conspiracy; and thereby plaintiff was compelled to and did contract for the manufacture of said machinery especially for its purposes with other persons, and paid therefor a much higher price than the usual and customary cost of similar powder-making machinery, and largely in excess of the cost of similar powder-making machinery to the said defendant and its associates, and largely in excess of what plaintiff could have obtained said machinery for, but for the threats, intimidation, and unlawful conduct hereinbefore in this paragraph set forth, to the damage of plaintiff in the sum of five thousand dollars (\$5,000).

Fifteenth. Plaintiff shows that, being unable to withstand the great and continuing losses forced upon it by reason of the unlawful

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and wrongful acts of the defendants as heretofore set forth, it was finally compelled to offer its mills, plant, and business for sale; that the methods and conduct of the defendants toward plaintiff had become generally known among powder manufacturers and dealers throughout the United States and foreign countries, as well as among the usual investors in property owned and used for the manufacture and sale of powder, and it was generally known that the methods employed by the defendants, and particularly by the defendant E. I. Du Pont de Nemours Powder Company against plaintiff, were the methods that had long been similarly employed against other manufacturers and vendors of powder who had attempted to operate independently of the defendants, or some of them, from time to time engaged in the conspiracy to monopolize the trade in explosives, and that generally independent operators had been unable to survive the combined assaults of said defendants, and for this reason there was no market for such property, except among the defendants, or some of them, and among investors who had been accustomed to invest only in such properties as were operated or controlled by the defendants, or some of them; and plaintiff, not being able to find a purchaser, or in fact to obtain any bid or offer from any source, finally solicited the defendants, or some of them, to purchase its mills and plant at the fair value thereof, and also to purchase its business, good will, and stock on hand, for the fair and reasonable value thereof, but all efforts to induce any of said defendants to consent to purchase said properties, or any of said properties, at the fair and reasonable value thereof totally failed, and plaintiff was then compelled, in order to keep said properties from going to waste, and in order to avoid suffering a total and irretrievable loss of the entire value of said properties, to accept any offer that it might be able to obtain therefor, without any regard whatsoever to the true and fair value thereof; and thereafter, to wit, on or about the 19th day of September, 1908, plaintiff sold and disposed of its entire plant, mills, business, and good will for the total sum of seventy thousand dollars (\$70,000), and the stock on hand for five thousand five hundred and four and $\frac{1}{100}$ dollars (\$5,504.08) additional. And plaintiff further shows that the nominal purchaser of said property was one Franklin W. Olin, of the city of Alton, State of Illinois; but plaintiff states that the said Olin purchased the same at the instance and request of the defendant E. I. Du Pont de Nemours Powder Company and others of the defendants herein, and under and in pursuance of a contract with the defendant E. I. Du Pont de Nemours Powder Company [§§7] and others associated with it at said time in said unlawful combination and conspiracy, whereby the said E. I. Du Pont de Nemours Powder Company and said associates agreed to purchase ninety-five per cent (95 per cent) of the future entire output of said mills and plant for a long period of time; that immediately after the said properties

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were so purchased by said Olin, a corporation was organized for the purpose of taking over and operating the same, said corporation being designated the Western Powder Manufacturing Company, and the said properties were thereupon transferred to said Western Powder Manufacturing Company, and it has ever since held the title to the same. And plaintiff further shows that the said Franklin W. Olin was at the time the president of the Equitable Manufacturing Company, forty-nine per cent (49 per cent) of the stock of which said company was then and is now held by the said defendant E. I. Du Pont de Nemours Powder Company, and which said Equitable Manufacturing Company had been theretofore for a long period associated with the said E. I. Du Pont de Nemours Powder Company in the said unlawful combination and conspiracy; that immediately after said purchase and transfer of said mills, plant, and business to the said Western Powder Manufacturing Company, the same began operating to the full capacity thereof, and have so continued down to the present time; that the entire output of said mills and plant was at once allotted and apportioned to the said E. I. Du Pont de Nemours Powder Company and its associates under said contract, and has ever since been and is being disposed of at the fair value thereof, and the business of said company at once became and ever since has been very profitable; that plaintiff further shows that at the time when it was so wrongfully compelled to sell and dispose of its plant, mills, business, and good will, as hereinbefore in this paragraph set forth, the true and fair value thereof was the sum of five hundred thousand dollars (\$500,000), and plaintiff has suffered damage on account thereof in the sum of four hundred thirty thousand dollars (\$430,000).

Sixteenth. Plaintiff shows that its mills and plant were equipped and designed to do a large and profitable business with users and dealers in explosives, and particularly black blasting powder; that, when operating at full capacity, it employed a large force of men in the manufacture of such powder, and was capable of producing one thousand (1,000) kegs daily; that the total annual capacity of said mills and plant, based upon three hundred (300) working days per year, was three hundred thousand (300,000) kegs of black blasting powder; that plaintiff began the manufacture of such powder on or about the 1st day of October, 1903; that during the year 1904, it manufactured and sold a total of only one hundred eight thousand seven hundred ninety-eight (108,798) kegs, and during the year 1905 a total of one hundred fifty-eight thousand one hundred six (158,106) kegs, and during the year 1907 a total of eighty-six thousand three hundred seventy-five (86,375) kegs, and from January 1 to August 31, 1908, a total of thirty-two thousand and fifty-nine (32,059) kegs; that the inability of plaintiff to keep its plant and mills working at the full capacity thereof was due to and was the natural and proximate consequence of the wrongful and unlawful acts of the defendants, as hereinbefore set forth; that every effort was made by plaintiff

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during all of said period, not only to increase its sales and keep its mills and plant operating to the full capacity thereof, but to maintain its customers and prevent the falling off of said sales, but by reason of the unfair, unlawful, and wrongful conduct of the defendants, and particularly of the defendant E. I. Du Pont de Nemours Powder Company, its agents, officers, and employes, as hereinbefore alleged, plaintiff was prevented from obtaining a fair share of the trade in black blasting powder and other explosives in said States, Territory, and foreign countries, and was prevented from making a fair and reasonable profit on the powder manufactured and sold by it as above set forth. And plaintiff shows that it was especially well equipped to secure a fair and reasonable portion of the said powder trade in fair and open competition; that said R. S. Waddell had full charge of the sales department of plaintiff, and that he carried on a persistent and energetic campaign, during the entire period aforesaid, for a fair share of [588] the powder trade in said States, Territory, and foreign country, and the business of plaintiff would have grown and increased from year to year, instead of decreasing as above stated, but for the acts of the defendants, and particularly the defendant E. I. Du Pont de Nemours Powder Company, as aforesaid; that the natural demand for black blasting powder within said States, Territory, and foreign country was sufficient to enable plaintiff to keep its mills and plant working to the full capacity thereof and its employes steadily employed. And plaintiff shows that its failure to keep its mills and plant working to the full capacity thereof, and to prevent a falling off of its business from year to year, instead of an increase thereof, was the natural and proximate consequence of the said acts of said defendants. And plaintiff shows that by reason of said unlawful and wrongful acts it sustained further losses as follows, to wit, the loss of the fair and reasonable profits on one hundred ninety-one thousand two hundred and two (191,202) kegs of black blasting powder, which it was prevented from manufacturing and selling during the year 1904, and one hundred forty-one thousand eight hundred and ninety-four (141,894) kegs during the year 1905, and two hundred twenty-five thousand two hundred and fourteen (225,214) kegs during the year 1906, and two hundred thirteen thousand six hundred and twenty-five (218,625) kegs during the year 1907, and one hundred sixty-five thousand four hundred and forty-one (165,441) kegs during the period extending from January 1 to August 31, 1908, making a total of nine hundred thirty-seven thousand three hundred and seventy-six (937,376) kegs, which it was thus prevented from manufacturing and selling previous to the time when it was forced by the defendants to dispose of its mills and plant and retire from business; that the fair and reasonable profits of said business which it was thus prevented from acquiring was the sum of thirty (30) cents per keg, after deducting all expenses connected with the manufacture, sale, and transportation, or a total of two hundred eighty-one thousand

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two hundred and twelve and $\frac{11}{100}$ dollars (\$281,212.80). And plaintiff further shows that if it had not been driven out of business by the defendants as aforesaid, and if it had not been unjustly and unlawfully interfered with in its right to continue in business and make fair and reasonable profits from the manufacture and sale of black blasting powder to the full capacity of its mills and plant from the 18th day of September, 1908, to the present time, it would have manufactured and sold during the said period three hundred thousand (300,000) kegs per annum, or a total of nine hundred thousand (900,000) kegs additional, upon which it would have made a profit of thirty (30) cents per keg, or a total of two hundred seventy thousand dollars (\$270,000) more. And plaintiff further shows that the fair profit on the powder which it actually manufactured and sold, as hereinbefore stated, and which it wholly lost by reason of the unjust and unlawful and wrongful acts of the defendants, as aforesaid, amounted to the sum of thirty (30) cents per keg on four hundred sixty-seven thousand one hundred and sixty-seven (467,167) kegs, or a total of one hundred thirty-nine thousand one hundred and forty-nine and $\frac{11}{100}$ dollars (\$139,149.10), making a total loss of profits resulting as the natural and proximate consequence of the acts of the defendants, as hereinbefore in this paragraph set forth, in the sum of six hundred ninety thousand three hundred sixty-one and $\frac{11}{100}$ (\$690,361.90) dollars.

Seventeenth. That with the intent to impede, impair, injure, and destroy the business of plaintiff, the defendants, and particularly the defendant E. I. Du Pont de Nemours Powder Company, maliciously, wantonly, willfully, oppressively, and wickedly, through their officers and agents, acting within the scope of their employment and by direction of and with the approval of the defendants, and particularly the defendant E. I. Du Pont de Nemours Powder Company, committed the wrongs herein set forth, whereby the business and property of plaintiff was injured and impaired and totally destroyed, to its further damage, and by reason thereof plaintiff is entitled to recover punitive or vindictive damages against said defendants, and particularly against the defendant E. I. Du Pont de Nemours Powder Company, in the sum of five hundred thousand dollars (\$500,000).

Wherefore plaintiff prays that, by reason of the matters and things hereinbefore set forth, it do have and recover judgment of and from the defend[ants] herein, and each of them, for threefold the damages suffered by it, amounting to the sum of one million one hundred nineteen thousand nine hundred and fifty-seven and $\frac{11}{100}$ dollars (\$1,119,957.82), as actual damages, and the sum of five hundred thousand dollars (\$500,000), as vindictive or punitive damages, or the total sum of four million eight hundred and fifty-nine thousand nine hundred seventy-three and $\frac{11}{100}$ dollars (\$4,859,973.46), for a reasonable attorney's fee, and for its costs and disbursements herein, as authorized by law in such cases made and provided.

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BUCKEYE POWDER CO. v. E. I. DU PONT DE NEMOURS POWDER CO. ET AL.*

(Circuit Court of Appeals, Third Circuit. July 2, 1915.)

[223 Fed. Rep., 881.]

MONOPOLIES 28—ANTI-TRUST ACT—ACTIONS FOR DAMAGES—PROOF.—

A plaintiff, to sustain an action under Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), for damages for violations of sections 1 and 2 of the act, brought prior to act Oct. 15, 1914, c. 321, § 5, 38 Stat. 781, declaring that a final judgment hereafter rendered in any suit brought by the United States under the Anti-Trust laws, to the effect that a defendant has violated the laws, shall be prima facie evidence against the defendant in any suit brought by any other person against the defendant under the laws, must prove that defendants have violated the Anti-Trust Act, and that by such violation they have so injured plaintiff that damages should be awarded, and the fact that defendants, in a suit by the United States, had been adjudged guilty of violating the act, was not available to plaintiff.^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. 28.]

APPEAL AND ERROR 1003—QUESTIONS REVIEWABLE—VERDICT—CONCLUSIVENESS.—The United States Circuit Court of Appeals may not determine whether a verdict is in accord with the weight of the evidence or review the verdict on any disputed fact, but may only inquire whether assignments of error, properly taken, disclose any material mistake in the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. 1003.]

APPEAL AND ERROR 839—QUESTIONS REVIEWABLE—DEFENSES.—Where the verdict for defendant relying on two defenses might have been given under either, plaintiff, on writ of error to review the judgment thereon, was entitled to raise legal rulings relevant to either defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3278-3280, 3286-3288, 3290-3293, 3297-3300, 3377; Dec. Dig. 839.]

MONOPOLIES 28—ANTI-TRUST ACT—ACTION FOR DAMAGES—EVIDENCE.—The mere fact that the majority of the stock of corporations engaged in the manufacture and sale of powder, other than black

* For opinion of the District Court (196 Fed., 514), see *ante*, page 560.

^b Syllabus copyrighted, 1915, by West Publishing Company.

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blasting powder, was owned or controlled by a corporation engaged in manufacturing black blasting powder did not alone show that the former corporations participated in a conspiracy by the latter to injure the trade and business of another manufacturing black blasting powder, suing all the corporations for damages under Anti-Trust Act, § 7.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

APPEAL AND ERROR 679—QUESTIONS REVIEWABLE—RULINGS ON PLEADINGS.—The action of the trial court in requiring plaintiff, suing for damages under Anti-Trust Act, § 7, for violations of sections 1 and 2 of the act, to elect on which violation it will rely, is not reviewable where all the evidence is not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2878-2879; Dec. Dig. 679.]

PLEADING 369—ELECTING CAUSE OF ACTION—SUIT UNDER ANTI-TRUST ACT.—Where the declaration, in an action for damages under Anti-Trust Act, § 7, sought a recovery for violations of sections 1 and 2 of the act the [882] court was justified in requiring plaintiff to elect on which section it would rely.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. 369.]

APPEAL AND ERROR 1039—RULINGS ON PLEADINGS—HARMLESS ERROR.—Where, in an action for damages under Anti-Trust Act, § 7, plaintiff's case depended on the truth of the charge to which practically all the evidence was directed, that defendants had unlawfully attempted to monopolize a large part of the trade in an article of commerce, and the case was tried on the merits, the ruling requiring plaintiff to elect whether he would rely on a violation of section 1 or of section 2 was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. 1039.]

JUDGMENT 644—ANTI-TRUST ACT—ACTIONS FOR DAMAGES—EVIDENCE—ADMISSIBILITY.—Where an action under Anti-Trust Act, § 7, for damages for violations of sections 1 and 2 of the act, was brought prior to act Oct. 15, 1914, making a final judgment in any suit by the United States under the trust law, to the effect that defendant has violated the law, prima facie evidence against defendant in any suit by any other person, a decree adjudging defendants guilty of violations of the Anti-Trust Act, rendered in a suit by the United States, was inadmissible, because the parties in the two suits and the subject matter thereof were different.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1157; Dec. Dig. 644.]

APPEAL AND ERROR 274—QUESTIONS REVIEWABLE—INSTRUCTIONS—EXCEPTIONS.—Where the court, in response to a party's requested instructions, stated that it had touched on every one of the requests, and did not charge them in the language requested, but counsel

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might take an exception that it did not specifically charge in the precise language requested, and the party only excepted to that portion of the charge which refused to give the requested instructions, except as charged, did not call the trial court's attention to what was objected to, and was insufficient to call for a review of the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605-1607, 1624, 1631-1645; Dec. Dig. 274.]

TRIAL 281—INSTRUCTIONS—REQUESTS.—It is not error to refuse a series of requested instructions where one of the instructions is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 680, 671, 678, 675; Dec. Dig. 261.]

MONOPOLIES 28—ACTIONS FOR DAMAGES UNDER ANTI-TRUST ACT—INSTRUCTIONS.—In an action for damages under Anti-Trust Act, § 7, for violations of sections 1 and 2 of the act, instructions which state that a defendant at the time of the organization of plaintiff company, and during the time plaintiff carried on its business, was acting in violation of the Anti-Trust Act as attempting to monopolize trade, but that the status of defendant did not make it liable to plaintiff, and plaintiff, to recover, must show that defendant used its power in the trade oppressively, at least generally, and thereby obstructed the free flow of commerce, and that, if plaintiff was sufficiently capitalized to carry on a struggle under normal conditions, it was immaterial whether it was or was not sufficiently capitalized to meet a competition forced on it by unlawful means, were not objectionable as equivalent to charging that, after a monopoly had obtained a foothold, competitors entered the field at their peril.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. 28.]

[888] APPEAL AND ERROR 978—NEW TRIAL 44—MISCONDUCT OF JURY—FINDINGS—DISCRETION OF COURT.—Refusal of new trial on the ground of misconduct of the jury, because having in their possession, during their deliberation, papers not in evidence, is discretionary, and will not be disturbed, except for abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. 978; New Trial, Cent. Dig. §§ 80-85, 105; Dec. Dig. 44.]

In error to the District Court of the United States for the District of New Jersey; John Rellstab, judge.

Action by the Buckeye Powder Company against the E. I. Du Pont de Nemours Powder Company and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 196 Fed. 514.

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Tweyman O. Abbott, of New York City, for plaintiff in error.

William H. Button, of New York City, and *Frank S. Katzenbach, jr.*, of Trenton, N. J., for defendants in error.

Before *BUFFINGTON*, *McPHERSON*, and *WOOLLEY*, Circuit Judges.

McPHERSON, Circuit Judge.

In this action at law, which is brought under section 7 of the Anti-Trust Act of 1890, the Buckeye Powder Company, an Ohio corporation, is the plaintiff, and three New Jersey corporations are defendants—the E. I. Du Pont de Nemours Powder Company, the Eastern Dynamite Company, and the International Smokeless Powder & Chemical Company. In essence the declaration charged that the plaintiff's business (the manufacture of black blasting powder) had been greatly injured and finally destroyed by the defendants' unlawful conduct, in violation of sections 1 and 2 of the act. Treble damages were asked for, amounting to nearly \$4,000,000, although this demand was much reduced at the end of the trial, and the dispute occupied the time of a court and jury during nearly all the working days between September 24, 1913, and February 25 of the following year. The case was submitted in a comprehensive charge marked by great ability and painstaking care, and the jury returned a verdict of "no cause of action as to all the defendants." So far as the Dynamite Company and the International Company are concerned, this was a directed verdict, the trial judge holding that the evidence did not establish their participation in any unlawful act; but the liability of the Du Pont Company was submitted to the jury and was passed on by that tribunal. Nearly 70 errors are assigned on the pending writ, but 20 of them are not pressed, and some that relate to the measure of damages are not now important. Those that still need attention can be considered more satisfactorily by taking up the subjects to which they relate than by taking them up seriatim. A short preliminary statement may be

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desirable in order to explain some of the questions that were presented to the court and jury.

[1] First, the relevant dates. The Buckeye Company was incorporated in January, 1903. It began business the following September and abandoned the field five years later, in September, 1908. The Du [884] Pont Company was incorporated in May, 1903, succeeding a number of earlier enterprises. The other defendants are older, the Eastern Dynamite Company going back to 1895, and the International Company to some date we have not found in the record, but apparently several years at least before 1903. The defendants admitted their participation in an illegal trade association as late as June 30, 1904, but denied that such participation continued thereafter. In June, 1911, the three defendants, in company with 25 other corporations and individuals, were adjudged to have violated the Anti-Trust Act. *United States v. Du Pont Co.* (C. C. 3d Circ.) 188 Fed., 127. But, as the Government's object in that suit was merely to dissolve an unlawful combination, we need hardly say that, under the long-established rules of evidence that were in force until a few months ago the Buckeye Company (a stranger to that proceeding) could not avail itself in the present suit either of the evidence then given or of the decree. It is true that these rules have since been changed by section 5 of the act of October 15, 1914 (38 Stat., 731, c. 321), which provides that:

"A final judgment or decree hereafter rendered * * * in any suit or proceeding in equity brought by or on behalf of the United States under the Anti-Trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

But as this statute had not been passed when the trial took place, and, moreover, as the express terms of the section confine it to future judgments or decrees, the Buckeye Company was obliged to offer evidence to prove the affirmative of the issues in the present suit: (1) That the defendants had violated the Anti-Trust Act; and (2) that by such viola-

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tion they had so injured the plaintiff that damages should be awarded. Voluminous evidence on these issues in many of their aspects was offered by both parties, and the verdict has settled numerous questions of fact in favor of the defendants.

[2] We need not dwell upon the point that we have no power to determine (as we are asked to do) whether the verdict was in accord with the weight of the evidence, or to review the finding of the jury on any disputed fact. Our only business is to inquire whether the assignments of error that were properly taken disclose any material mistake in the trial. For this reason much of the plaintiff's argument must be laid aside as irrelevant; indeed, the brief contains so much that is nothing more than a conscious or unconscious attack on the verdict that we have not always found it easy to disentangle the questions of law that lie within our province from the questions of fact that lie outside.

In a few words, the situation below was this: The plaintiff charged, and attempted to prove, that an unlawful and extensive combination in several forms had existed for more than 30 years, the object of the evidence being to establish the fact that a more or less complete monopoly had been created of the trade in powder (especially in black blasting powder) and other explosives; that this attempted monopoly and consequent restraint of trade had been substantially successful, and was maintained from January, 1903, to the end of 1908, the whole [885] period covered by the suit; that R. S. Waddell, a man with large experience in the trade, who had been employed by the defendants for more than 20 years, had undertaken to organize the plaintiff corporation for the purpose of making and selling black blasting powder; that the defendants thereupon began to interfere with his project in various unlawful ways; and that these attempts to injure the business continued after the Buckeye Company had been incorporated and after its plant had been built near Peoria, Ill. Charges of oppressive conduct were set forth in great detail; some of such acts being directed specifically against the plaintiff, and other acts being directed against the plaintiff in company with other of the defendant's rivals. As a result the Buckeye Company al-

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leged that its enterprise suffered injury from the beginning, and was finally sold out and abandoned at a serious loss.

The defendants denied these charges, and the plaintiff (having the burden of proof) undertook to prove some of them, but by no means all. Much conflicting evidence was taken, filling a record of several thousand pages. Among other matters the defendants contended that they had done nothing to bring about any abnormal conditions in the trade, and, if the plaintiff had suffered loss from such conditions, its misfortune should not be laid at their door. On the contrary, they insisted that the plaintiff's troubles were due to its own faults or blunders, such as improper organization, lack of capital, insufficient experience, inattention to business, misrepresentations to customers, inability to fill orders, and furnishing bad powder. A great deal of the record is devoted to this branch of the dispute, and many witnesses testified that the defendants did not interfere with the plaintiff's customers or entice them away. When they left, it was because the plaintiff had not satisfied them. To refute the charge that the defendants had oppressively and illegally lowered prices, evidence was offered that during the period in question there was much independent competition, led by the plaintiff itself, and that this competition was the prevailing, if not the sole, factor in lowering prices. There was also evidence that the Du Pont Company's hold on the trade, and the volume of its business, continually diminished during the whole period of the suit.

[3] Two distinct defenses were therefore set up: (1) A denial that the Anti-Trust Act had been violated by the defendants after June 30, 1904; and (2) an assertion that, even if such violation had taken place, the plaintiff had suffered no injury therefrom, but had met with loss and final failure because its equipment had not been adequate, and its management had not been competent. Each defense raised numerous questions of fact, and, as the verdict in favor of the Du Pont Company may have been founded as well upon one defense as upon the other, the legal rulings that are relevant to either defense are open to the plaintiff's attack. Let us turn to such of the legal questions as we think it necessary to notice.

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[4] 1. In our opinion the direction to find a verdict in favor of the Dynamite Company and of the International Company was correct. Neither of these corporations manufactured or traded in black blasting powder (which was the particular business the defendants were charged with restraining or monopolizing), and their indirect connection with the alleged unlawful combination was rested almost wholly [886] on the fact that a majority of the stock in each was owned or controlled by the Du Pont Company. Obviously, however, this fact alone did not prove their participation in a conspiracy, and, as there was almost nothing else to support the allegation, we need not take further time to discuss it. Moreover, only selected portions of the evidence are before us, and the district judge very properly called attention to this fact when he granted the exception now being considered, saying:

"In my judgment this exception to be considered should have behind it the entire record, but it is allowed and signed that the plaintiff may have the benefit of it in case I am in error in that view."

[5] 2. The plaintiff complains also because the trial judge required it to elect whether it would insist before the jury on a violation of section 1. of the Anti-Trust Act, or on a violation of section 2. Manifestly, the correctness of this ruling also can only be satisfactorily reviewed upon the whole record, and what we have just said applies to this assignment as well.

[6, 7] Moreover, we may take note of the fact that this subject had evidently been a source of contention from the beginning of the suit, as will appear from Judge Rellstab's opinion in (D. C.) 196 Fed. 514, where the original declaration is printed. The question of duplicity was thus raised at an early stage, and as a result of that decision an amended declaration was afterwards filed. But this also contained only one count, and as Judge Lanning (sitting in the Circuit Court for the District of New Jersey) had already decided in *Rice v. Standard Oil Co.* (C. C.) 134 Fed. 464, that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count, we think the trial judge was suffi-

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ciently justified in requiring the plaintiff to elect. But, in any event, we do not see how the ruling could have done harm. If the declaration did not support alternative charges, and if such charges were regarded as important to the case, the easy remedy by amendment was at hand. It is not surprising, however, that the plaintiff did not ask to amend, for we cannot conceive it possible that anyone could doubt, at the end of this five months' trial, that the plaintiff's case depended for success upon the truth of the charge (to which practically all the evidence was directed) that the defendants had unlawfully attempted to monopolize a large part of the trade in black powder. The case was certainly tried on the merits, and the ruling complained of was harmless, even if it were formally erroneous.

[8] 3. If we are to understand that the plaintiff is seriously insisting that the court erred in refusing leave to offer the decrees in evidence that were entered in the Government's suit ([C. C.] 188 Fed. 127), we shall only say in reply that we are not aware of any rule of evidence in force at the time of the trial that would have warranted the court in making a different decision. The parties in the two suits were different; the subject matter was different; and the trial judge's ruling is so fully justified by the well-established law then existing that no supporting authority need be cited.

[9] 4. Some of the assignments are not the subject of a proper exception. At the close of the evidence the plaintiff submitted a series [887] of 27 requests for instruction, and the trial judge did not answer them specifically, believing that he had substantially answered them in his general instructions, as of course he had a right to do. This is evident from what he said at the end of the charge:

"As to the plaintiff's requests, as I recall it, I have touched upon every one of these requests, and I therefore will not charge them in the language requested, but counsel may take an exception, of course, to the fact that I do not specifically charge in the precise language requested."

This, of course, invited counsel to point out which instructions, if any, they did not regard as sufficiently answered in the general charge. Many decisions declare that fairness

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to the court requires this to be done; but the plaintiff's counsel, instead of specifying errors or omissions or insufficient answers, asked for an exception in the most general language possible: "We also except to that portion of your honor's charge which refuses to give our instructions, except as charged." The Supreme Court has several times decided that such an exception does not call the court's attention properly to what is objected to, and is therefore insufficient. *Beaver v. Taylor*, 93 U. S. 55, 23 L. Ed. 797; *Upton v. McLaughlin*, 105 U. S. 646, 26 L. Ed. 1197; *Jones v. Railroad*, 157 U. S. 682, 15 Sup. Ct. 719, 39 L. Ed. 856; *Thiede v. Utah*, 159 U. S. 521, 16 Sup. Ct. 62, 40 L. Ed. 237.

[10] And, as the fourth request of the series is not sound, the action of the trial judge is also supported by *Moulor v. Insurance Co.*, 111 U. S. 337, 4 Sup. Ct. 466, 28 L. Ed. 447, and *Bogk v. Gassert*, 149 U. S. 26, 13 Sup. Ct. 738, 37 L. Ed. 631.

[11] 5. The plaintiff also complains of certain parts of the charge as erroneous on the ground that the court's language was:

"* * * Tantamount to saying that monopoly needs but to obtain a foothold, and thereafter competitors must enter the field at their peril. It was a virtual direction of a verdict for the defendants, because it was equivalent to saying that long-continued violation of the law may ripen into privilege and may become a vested right. It is a most dangerous doctrine that monopoly can gain the right to perpetuate itself by prescription; that one who may venture into the field occupied by it must do so at his peril, and, if he does so with knowledge of its existence, can claim no protection from its unlawful methods."

It is almost needless to say that the instructions of the learned judge carry no such meaning, and could have had no such effect. After a preliminary statement outlining the previous history of the powder trade, he told the jury distinctly that:

"The defendant (the Du Pont Powder Company) therefore, at the time of the organization of the plaintiff company, * * * and during the entire time the plaintiff carried on its business, was acting in violation of the Anti-Trust Act as attempting to monopolize the trade in powder, which subjected it to be dissolved as such by direct attack on the part of the United States Government."

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He added, however, the qualification that was called for by the nature of the case on trial:

"The fact that the status of the defendant was such, however, that, under a direct attack by the Government, it would be dissolved as an unlawful combination in restraint of trade and an attempt to monopolize, would not alone make it liable in an action for damages. Such a suit can be maintained only for injuries sustained by reason of such attempted monopolization, so that, in a suit for damages, the defendant is entitled to more defenses than would [888] be available in a suit brought by the Government for dissolution, and the plaintiff in such a suit has more to prove than is necessary to obtain a decree in the Government suit. It becomes important, therefore, to inquire into the relationship which the defendant bore to the powder trade generally at the time when the plaintiff asserts its promoter first declared his intent to engage in the powder business, and its subsequent relationship toward such trade generally, and to the plaintiff in particular, during the years 1903 to 1906, within which period the plaintiff claims it was being injured by reason of the acts of the defendant, and which it alleges were unlawful and within the operation of the Anti-Trust Act, as attempts to monopolize the powder trade."

He then summarized the foregoing paragraph, repeating that the mere fact that the defendant owed much of its growth and power in the trade to unlawful acts in the past, and that it continued to enjoy the fruits of some of such unlawful acts, did not make it liable in damages. Then follows immediately one of the passages attacked in the words already quoted from the plaintiff's brief:

"This suit is unique in many respects. The plaintiff, as a corporation and as a competitor in the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant, with which and its predecessors he had been identified for about 20 years. His services, while in the employment of the Du Pont interests, brought him in touch with their business policies and operations in the vending of powder. He knew of the existence of the trade associations, and of such of the restraints and limitations put upon its members as related to the apportionment of the trade and the fixing of prices. The comparative size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, were known to him when he severed his connection, and when he conceived and began to carry out his purpose of entering into such powder field as a competitor. The plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being

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developed, and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have been established. To it (the plaintiff) this influence and power of the defendant when it (the plaintiff) was launched into the powder field is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act, and, before the plaintiff can recover, it must establish that the defendant used its power in the trade oppressively, not necessarily against the plaintiff alone, but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce (the trade conditions sought to be secured and protected by the prohibition of the Anti-Trust Act), and that it (the plaintiff) was injured by reason thereof."

We confess our inability to see anything objectionable in this language. It states nothing but indisputable facts, and does not take on a harmful character, even when it is bracketed with the second passage complained of. This is taken out of its place in another portion of the charge, where the learned judge was dealing with a wholly different subject, namely, with the question whether the plaintiff had been properly equipped and capitalized; this matter having a direct bearing on the defendants' allegation that the Buck-eye enterprise was organized merely to be sold out, and was not intended to be a bona fide factory at all:

"Mr. Waddell, as already stated, was well advised, when he promoted the plaintiff company, of the defendant's business capacity and policies. He [889] had been its agent for a long period, during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form or another of such newcomers, and at least in one instance (that of the Indiana) at a considerable profit to the owners of that company. Of course, Mr. Waddell, or the company which he formed, had a right to go into business, and the motive for entering into such business is of little moment, so far as their rights were concerned; but, if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied. Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions,

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that is a sufficient answer, and it would make no difference whether it was or was not sufficiently capitalized to meet a competition forced upon it by unlawful means."

Certainly, as we think, no sound criticism can be made of these passages, either taken singly or placed side by side, and we shall make no further comment upon them.

6. With one exception, we do not think it necessary to take up separately any other subject embraced in the assignments of error. They have all been examined and considered, and in our opinion none of the rulings and instructions complained of could have been materially harmful, even if a minute scrutiny might disclose an occasional lapse from an ideal standard. No record could come unscathed through such an ordeal after a five months' trial, and it is greatly to the credit of the district judge that so little of importance is now urged for reversal. Many of the assignments seem to be of very slight importance, indeed, and may be passed without discussion.

[12] 7. The only subject that may need a few words of separate consideration is the refusal to grant a new trial. The principal ground of complaint pressed upon us is the fact that, while the jury were deliberating on their verdict, they had in their possession two papers, whose contents are said to have been of such a nature as to influence them improperly. This matter, however, has already been heard and decided by the district court, and we find nothing in the record to make the present situation exceptional. The facts are these: After the verdict was rendered a motion for a new trial was made and entertained. It assigned the usual general and formal reasons (that the verdict was against the law and against the weight of the evidence, and that the charge was erroneous both in what it said and in what it failed to say), and then added a special reason to the effect that the jury had had before it certain letters and other papers that were not in evidence. Manifestly this reason required the taking of testimony, and accordingly a number of witnesses were examined. On April 10 the motion was fully argued before the court, and was refused after what was evidently a thorough consideration. The rule in the

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Federal courts being well settled that such a refusal is a matter of discretion that will not be reviewed except for abuse, we shall only add that we have read and considered everything contained in the record on this subject and can see no sufficient ground for interfering with what was done by the court below. Indeed, we incline to think that the subject may perhaps have been brought before us under a misapprehension, for it was argued as if the district judge had refused to [890] hear and entertain the motion at all, except upon the special reason referred to above, although (as we understand the record) the facts do not support such a position. On the contrary, the motion was made, and was promptly entertained, the court made an order for the taking of testimony, witnesses were examined, argument was heard, and on April 10 the whole subject was disposed of by an order discharging the rule that had been granted and refusing the motion. We see nothing reviewable in such a proceeding.

On the whole case we are of opinion that the plaintiff had a fair and patient trial, and that whatever complaint he may have should be directed to the verdict rather than the action of the court.

The judgment is affirmed.

**LOCKER ET AL. v. AMERICAN TOBACCO CO.
ET AL.***

(District Court, S. D. New York. January 22, 1912.)

[194 Fed. Rep., 232.]

PLEADING (§ 320)—BILL OF PARTICULARS.—Where, in an action for damages for injuries sustained by an alleged unlawful combination in restraint of trade, the complaint alleged a combination, which was not against plaintiffs specifically, the proof of which might be founded on inferences to be drawn from the course of business, and two of the defendants had already been held to have partici-

* For later opinions (197 Fed. 425) see *post*, page 612; (220 Fed. 973) see *post*, page 614; (218 Fed. 447) see *post*, page 618.

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pated in the illegal combination in a proceeding brought by the United States on behalf of the public, and the other had knowledge of its own relation to the defendants and wherein it participated in any combination, defendants were not entitled to a bill of particulars, alleging specific details of the combination and its effect on plaintiffs.*

[ED. NOTE.—For other cases, see Pleading, Cent. Dig. § 972; Dec. Dig. § 320.]

PLEADING (§ 817)—BILL OF PARTICULARS—SPECIAL INJURY.—Where, in an action to recover damages for injuries due to an alleged unlawful combination in restraint of trade, the damages claimed were very large, and were in the nature of special damages, defendants were entitled to a bill of particulars with reference thereto.

[ED. NOTE.—For other cases, see Pleading, Dec. Dig. § 817.]

At Law. Action by John A. Locker and another, trading as E. Locker & Co., against the American Tobacco Company, the Metropolitan Tobacco Company, and others. On application for bill of particulars. Granted in part.

Charles Dushkind for plaintiffs.

Nicoll, Anable, Lindsay & Fuller for defendants American Tobacco Co. and others.

Goldsmith, Cohen, Cole & Weiss for defendant Metropolitan Tobacco Co.

WARD, Circuit Judge.

The court, when asked to order a bill of particulars, has to steer between two evils, namely, unreasonably restricting the plaintiff's case or exposing the defendant to surprise at the trial.

[1] The combination alleged in the complaint is not one against the plaintiff specifically, in which case greater particularity might be required, but against the public generally. The proof of it may be founded on inference to be drawn from the course of business, and the plaintiffs may

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be unable to state specific details. The other defendants, the American Tobacco Company, the American Snuff Company, and Blackwell's Durham Tobacco Company, have already been held to have participated in an illegal combination in a proceeding brought by the United States on behalf of the public. The defendant the Metropolitan Tobacco Company, which asks for the bill of particulars, of course has knowledge of its own relation to its co-defendants, and whether it had participated in any combination, especially in relation to the charges in articles 32 to 40 of the complaint, in which it is specifically named. Its co-defendants may be [233] relied on to meet other charges in the complaint of which it has no direct knowledge.

[2] In view of all the circumstances, I think the pleading sufficiently apprises the Metropolitan Tobacco Company of what it will have to meet at the trial; but the damages claimed being very large, and being in the nature of special damages, I think the defendants are entitled to a bill of particulars showing the amount and kind of damage the plaintiffs have suffered since the year 1905, and how the same resulted from the conspiracy alleged in the complaint.

To that extent the motion is granted.

LOCKER ET AL. v. AMERICAN TOBACCO CO.
ET AL.*

(District Court, S. D. New York. July 18, 1912.)

[197 Fed. Rep., 495.]

MONOPOLIES (§ 23)—FEDERAL ANTI-TRUST ACT—VIOLATION—TREBLE DAMAGES—RIGHT OF ACTION.—To give a private right of action under Anti-Trust Act, July 2, 1890, c. 647, § 7, 26 Stat., 210 (U. S. Comp. St. 1901, p. 3202), for treble damages for injury done to plaintiff's business through a combination by defendants in restraint of trade, the cause of action must be complete when suit is brought; the Government alone having power to check future contemplated unlawful acts, and hence, in an action against several defendants,

* For prior opinion (194 Fed., 232) see *ante*, page 610. For later opinions (200 Fed., 973), see *post*, page 614; (218 Fed., 474), see *post*, page 618.

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plaintiff is not entitled to bring in as defendants corporations which were organized after the action was brought.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig., § 18; Dec. Dig., § 28.]

Action by John A. Locker and another against the American Tobacco Company and others. On motion for leave to amend summons by inserting the names of the Liggett & Myers Tobacco Company and the P. Lorillard Company as co-defendants and to amend the complaint by inserting various allegations as to acts done by them. Motion overruled.

See, also, 194 Fed., 232.

[496] LACOMBE, Circuit Judge.

This is an action against the four named defendants to recover treble damages for injury alleged to have been done to plaintiff's business by reason of said defendants having entered into a combination in restraint of trade and carried on such combination in such a way that plaintiff's business sustained the injury complained of. The action is brought under the seventh section of the Federal Anti-Trust Act July 2, 1890. Its gravamen is tortious action, and it is elementary that the cause of action must be complete when suit is brought. Until the wrong is done and the injury suffered, there is no cause of action under this section. Threatened wrong and apprehended loss are not within its provisions. To the Federal Government alone does the Anti-Trust Act confide the power to check future contemplated unlawful acts by injunction. The relief accorded to the individual is an action at law for treble damages when he can show that the act has been violated, and that such violation has injured him in his business or property. He cannot maintain such an action, if his complaint fails to show that at or prior to the time when the action is begun defendant had done any act in violation of the statute. This analysis of the seventh section sufficiently answers the present application. The action was begun June 10, 1910. The two corporations which plaintiff now asks to include as defendants were not incorporated until November, 1911. Since they were not in existence on and prior

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to June 10, 1910, it is impossible that they could by that time have done any act in violation of the statute. If subsequent to their creation they have violated the statute, and by reason of such violation plaintiff has been injured in his business or property, he may have a good cause of action against them for such tortious act, but that is a new and independent tort and a separate cause of action from the one declared on here.

The motion is denied.

LOCKER ET AL. v. AMERICAN TOBACCO CO.
ET AL.*

(District Court, S. D. New York. November 29, 1912.)

[200 Fed Rep., 973.]

APPEAL AND ERROR (§ 1039)—HARMLESS ERROR—BILL OF PARTICULARS.—Under Code Civ. Proc. N. Y. § 531, which authorizes courts to require bills of particulars and to preclude a party failing to comply with such an order from introducing evidence of the matters to which the order relates, the furnishing of a bill of particulars is in itself a limitation of claim to the particulars stated, and while it is not necessary to express the limitation in the order, such a provision is not prejudicial.^b

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1089.]

PLEADING (§ 317)—BILL OF PARTICULARS.—In an action to recover special damages in a very large sum, alleged to have been caused by an illegal combination by defendants in restraint of trade, a defendant is entitled to a bill of particulars, stating in what such damages consist, and in what way they were caused to plaintiff by the alleged conspiracy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 954-962; Dec. Dig. § 317.]

At law. Action by John A. Locker and Elma Locker, trading as R. Locker & Co., against the American Tobacco Company, the American Snuff Company, the Blackwell's

* for prior opinions (194 Fed., 252), see *ante*, page 610; (197 Fed., 495), see *ante*, page 612. For later opinion (228 Fed., 447); see *post*, page 618.

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Darham Tobacco Company, and the Metropolitan Tobacco Company. On motion to resettle order requiring bill of particulars. Overruled.

See, also, 197 Fed., 495.

[974] *Jacob C. Brand*, of New York City, for plaintiffs.
Chas. M. Sheafe, of New York City, for defendants.

WAM, Circuit Judge.

This is a motion by the plaintiffs to resettle an order requiring them to furnish a bill of particulars to the Metropolitan Tobacco Company, one of the defendants. January 27, 1912, the court entered the following order:

"Ordered, that within ten (10) days after the service of a copy of this order upon the plaintiffs, or plaintiff's attorney, the plaintiffs serve upon the attorneys for the defendant Metropolitan Tobacco Company, at their office, a verified bill of particulars showing the amount and kind of damage the plaintiffs have suffered since the year 1905, and how the same resulted from the conspiracy alleged in the complaint."

March 11 the plaintiffs furnished a bill claiming \$25,000 for loss of good will, sums aggregating over \$75,000 for loss of profits in the years from 1905 to 1911, inclusive, enhanced prices paid for goods during the same years, aggregating over \$84,000, and additional expenses incurred during the same period, aggregating over \$20,000, together with a statement as to the way in which these losses were connected with the conspiracy complained of.

March 18 the court ordered a further bill of particulars as follows:

"Ordered, that the plaintiffs be, and they hereby are, precluded from introducing at the trial of this action any evidence concerning their damages, sustained since 1905, other than the items set forth in the further bill of particulars, heretofore furnished and dated March 11, 1912, and that in proving such damages they be precluded from computing the same by any other method than the one set forth in said further bill of particulars; and it is

"Further ordered, that the plaintiffs be, and they hereby are, directed to serve upon the attorneys for the defendant Metropolitan Tobacco Company, within ten (10) days after service of a copy of this order, with notice of entry thereof, a second further verified bill of particulars, itemizing and particularizing the additional expenses necessarily incurred by plaintiffs for each of the following purposes,

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namely: In employing (1) extra salesmen; (2) extra buyers; (3) extra drivers; (4) extra horses; (5) extra wagons; and (6) in granting extra inducements, presents, premiums, and gratuities."

The plaintiffs apply to resettle this order, by striking out the first paragraph, which it will be noted incorporates the similar provision contained in the order of January 27.

It is said that the foregoing order may be understood by the trial judge to prevent the plaintiffs from proving damages sustained before 1905. It does not, because the defendant Metropolitan Tobacco Company asked only for particulars of damage occurring after that date, apparently because it thought earlier damages would be barred by the statute of limitations.

It is also said that the order may preclude the plaintiffs from offering evidence of damages sustained between the beginning of the suit and the trial. Assuming that they have sustained damages which could be proved down to the time of trial, in accordance with the case of *Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261, it will be their own fault if they are not allowed to do so, because in their bill of particulars they only alleged damages sustained down to [1975] and including 1911, without claiming prospective damages after that date.

[1] The plaintiffs quite truly say that the provision contained in section 531 of the Code of Civil Procedure as to preclusion applies only where, a bill of particulars having been ordered, none at all has been furnished; also that the proper practice is, not to include the provision as to preclusion in the order granting the bill of particulars, but to require a separate independent order to that effect if no bill is furnished. This gives the party in default a locus penitentie. *Reader v. Haggin*, 114 App. Div. 112, 99 N. Y. Supp. 681; *Foster v. Curtis*, 121 App. Div. 689, 106 N. Y. Supp. 388; *Hein v. Honduras Syndicate*, 138 App. Div. 786, 123 N. Y. Supp. 431. But the furnishing of a bill of particulars is in itself a limitation of claim to the particulars stated in the bill. There is no need to express the limitation in the order, although I think it is often done. All that can be said is that such a provision is superfluous. *Bowman v. Earle*, 8 Duer (N. Y.) 691; *Cochrane Co. v. Howells*, 81 Hun, 610, 30 N. Y. Supp. 1029.

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[2] The final objection, and the really important one, is that the order should not have required the plaintiffs to state how their alleged damages were caused by the conspiracy complained of, and should not have restricted them to proof in accordance with the particulars so furnished. This latter restriction, as pointed out above, was unnecessary; for, if the plaintiffs were properly required to state how the damages they claimed were connected with the conspiracy, the bill of particulars itself, without more, would have restricted their proof at the trial to the method of connection stated in it.

Bills of particulars have grown from very small and technical beginnings into most important instruments of justice. Originally they were confined to accounts, then extended to contracts generally, and finally to torts. Section 531 of the Code of Civil Procedure authorizes courts to grant them "in any case." While they are not intended to advise a party of his adversary's evidence or theory, they will be required, even if that is the effect, in cases where justice necessitates it. For instance, in actions for damages caused by the negligence of servants, the plaintiff is constantly required to name the servant alleged to have been negligent, and to state the particulars in which he was negligent. Likewise, where the master's works, ways, or machinery are complained of as defective, the plaintiff will be required to state the defects and the way in which they caused his injuries. One of the main purposes is to prevent surprise, and to advise the party of what he is to meet at the trial. *Dwyer v. Slattery*, 118 App. Div. 345, 103 N. Y. Supp. 433; *Bjork v. Post*, 125 App. Div. 813, 110 N. Y. Supp. 206. Very interesting cases, more applicable to the one now under consideration, are *Shaw v Stone*, 124 App. Div. 624, 109 N. Y. Supp. 146; *Messer v. Aaron*, 101 App. Div. 169, 91 N. Y. Supp. 921; *Mayor v. Marrener*, 49 How. Prac. (N. Y.) 36; *Leigh v. Atwater*, 2 Abb. N. C. (N. Y.) 419.

The claim in this case is unusual. It is for damages in a very large sum, which, if proved, will be trebled. The damages claimed are not general, such as are necessarily to be expected, but special. There is no necessary connection

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between the plaintiff's loss of good will, of [976] profits, and of trade, and increase of expenses, and the conspiracy complained of. Such results might have been due to a multitude of other causes. It is fair that the defendant should be advised in what way the conspiracy complained of resulted in these large losses, so that it will be able to meet the claim at the trial.

The motion is denied.

LOCKER ET AL. v. AMERICAN TOBACCO CO. ET AL.*

(Circuit Court of Appeals, Second Circuit. November 10, 1914.)

[218 Fed. Rep., 447.]

MONOPOLIES (§ 28)—SHERMAN ANTI-TRUST ACT—DAMAGES.—Proof that defendants have violated the Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, §§ 8820—8830), will not establish a cause of action for damages to plaintiffs' business, recoverable under section 7 (8828), unless it is proved that the defendants' acts have injured plaintiffs and caused them damages recoverable at law.^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. § 28.]

MONOPOLIES (§ 17)—SHERMAN ANTI-TRUST LAW—INJURIES—SCHEDULE OF BUSINESS—REFUSAL TO SELL JOBBERS.—Where certain tobacco manufacturers had formed a combination in restraint of trade in violation of the Sherman Anti-Trust Act, and had appointed the M. Company their sole jobbing agent in Greater New York, on condition that it should not sell at more than list prices, receiving a discount on the goods sold, a determination on its part that it would not sell to other jobbers in its territory, but only to retailers, because its former practice of selling to jobbers resulted in insufficient service by its [448] salesmen to retailers, such determination was not illegal, and did not constitute a violation of the act, for which a jobber, whose orders were declined, could recover treble damages under section 7.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.]

* For prior opinions (194 Fed. 232) see *ante*, page 610; (197 Fed. 495) see *ante*, page 612; (200 Fed. 973) see *ante*, page 614.

^b Syllabus copyrighted, 1915, by West Publishing Company.

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In error to the District Court of the United States for the Southern District of New York.

On writ of error to the District Court for the Southern District of New York to review a judgment in favor of the defendants. The complaint was dismissed, as to the defendants Blackwell's Durham Tobacco Company and the American Snuff Company and a verdict was directed in favor of the American Tobacco Company and the Metropolitan Tobacco Company. An action similar to this was brought in the State courts and the complaint was dismissed. The dismissal was sustained by the New York Court of Appeals. 195 N. Y. 565, 88 N. E. 289.

See, also, 200 Fed., 973.

Charles Dushkind, of New York City, *Charles C. Daniels*, and *John S. Wise*, of New York City, for plaintiffs in error.

Delancey Nicoll, *Junius Parker*, and *Thomas S. Fuller*, all of New York City, for defendants in error The American Tobacco Co., American Snuff Co., and Blackwell's Durham Tobacco Co.

William N. Cohen, *Arthur J. Cohen*, and *William S. Weiss*, all of New York City, for defendant in error Metropolitan Tobacco Co.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge.

The suit is brought under section 7 of the Anti-Trust Act, which is as follows:

"SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of the suit, including a reasonable attorney's fee."

[1] It matters not that certain of the defendants have violated the provisions of the Sherman Act unless it be proved that such acts have injured the plaintiffs and caused them damages which can be recovered in an action at law.

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[2] The plaintiffs were doing business in Brooklyn as jobbers in tobacco and its products and were not engaged in manufacturing. The American Tobacco Company is a manufacturer of cigarettes, plug and smoking tobacco. The defendant American Snuff Company is a manufacturer of snuff. The Blackwell's Durham Company is a manufacturer of smoking tobacco. The Metropolitan Tobacco Company was engaged in substantially the same business as the plaintiffs, viz, not as a manufacturer, but as a jobber of tobacco and its products, which it purchased from the manufacturer and sold to retailers in New York and Brooklyn.

[449] It is not now contended by the defendants that the American Tobacco Company, American Snuff Company, and Blackwell's Durham Tobacco Company were not a combination forbidden by the Sherman Law during the time covered by this action. The agreement between the American Tobacco Company and the Metropolitan Company was, it seems to us, a legitimate one, viz, to make the Metropolitan Company its sole agent in greater New York, on condition that it should not sell the American Company's product at more than the list prices. The Metropolitan Company was to receive a discount of five per cent on goods so sold. The agreement was not reduced to writing. The plaintiffs entered business in 1903 after the foregoing arrangement had been in existence for about five years. In June, 1904, the Metropolitan Company concluded that it would not sell to local jobbers but would sell direct to the retail trade in Brooklyn. The reasons for this change in policy are fully set out in the testimony and seem to be fair and reasonable. If the manufacturing defendants had concluded to sell their products solely through instrumentalities of their own and had organized in their factories a selling department through which they supplied their products to all who desired to purchase them, it will hardly be contended that such action was even within the mischief of the Sherman law. How, then, does an act which the defendants might lawfully do themselves become unlawful when done by another to whom they sell or consign their goods? There can be no pretense that the Metropolitan Company has received any unlawful preference or clandestine favors from the manu-

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facturers. The prices at which they sell to the Metropolitan Company are their own list prices and there is nothing to show that the manufacturers received an exorbitant profit by this arrangement. The Metropolitan Company may sell for less than the list price but it can not sell for a higher price. It is not prohibited from buying or selling the products of other manufacturers at any price which it may induce the manufacturer to take or the purchaser to give. We are unable to discover anything illegal or unfair in the Metropolitan Company's method of conducting business. It is not the sole agent of the other defendants but deals with the produce of many manufacturers, in no way connected with the manufacturing defendants, who are apparently entirely satisfied with the Metropolitan's methods and treatment. The reasons for the adoption of these methods are well stated by Mr. Bendheim, the president of the Metropolitan Company, as follows:

"Q. Mr. Bendheim, will you now state to the court and jury the condition that existed in Brooklyn that led you to refuse to sell the jobbers in that territory during that period; that is, in May, 1904?—
A. We were losing our hold on the retail trade, which we considered against our interest in a great many ways. Our salesmen preferred to sell jobbers, because it is easier to sell a bill of \$100 than 40 or 50 cents of assorted goods. They drifted gradually into the habit of selling the wholesalers more than retailers. We had promised and agreed to call on retailers once a week, and they were not being called on. Systematically it weakened our power to introduce the goods. Our goods were used to help along other goods, outside goods, and those were the main conditions."

Under the method complained of, the sequence, is producer, jobber, retailer, consumer. This seems the usual, natural, and fair way of [450] getting the goods from the manufacturer to the consumer. We can think of no reason based on the common law or the Sherman Law which required the introduction of a second jobber or wholesaler between the producer and the consumer. In short, we are convinced that what was done by these defendants was not prohibited by law, but was a reasonable, common-sense trade arrangement dictated by the exigencies of the situation. We see nothing forbidden by the Sherman Act in a manufacturer consigning or selling his product to a jobber for a particular territory and placing certain restrictions upon the prices at

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which the goods are to be sold. Many of the large mills have a factor in New York to whom their products are thus consigned. He can sell to A or B, or both, as he sees fit and the consignor is not concerned with the transaction so long as he gets his price and the terms of the consignment are not violated. The same is true of the jobber; he is at liberty to sell to one retailer or twenty retailers as he sees fit.

We are unable to discover anything illegal in a manufacturer of tobacco disposing of his goods to a jobber to sell to retailers, or, if he deems it advisable, to change his policy and sell direct to the retailer himself. Why may he not do so? One who desires to become a jobber has no right to complain because the manufacturer chooses another to do this work, unless the manufacturer owes some duty to consign his product or a part thereof to him. The laws of trade are not wholly altruistic, they may often be hard and selfish, but it is no part of the duty of courts to attempt to enforce the precepts of the decalogue. In the struggles engendered by fierce competition, losses must occur and injustice may be done, but this is frequently inevitable and can not be prevented so long as the parties keep within the law.

As we have thus disposed of the case upon the principal question, it is unnecessary to discuss the subsidiary questions involved. We think it proper to say, however, that we find no satisfactory proof of damages; the matter seems to be left to speculation and conjecture.

The judgment is affirmed with costs.

STANDARD SANITARY MANUFACTURING COMPANY v. UNITED STATES OF AMERICA.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

No. 554. Argued October 15, 16, 17, 1912.—Decided November 18, 1912.

[226 U. S., 20.]

A trade agreement under which manufacturers, who prior thereto were independent and competitive, combined and subjected themselves to certain rules and regulations among others limiting output

* For opinion of the Circuit Court (191 Fed., 172), see ante, page 295.

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and sales of their product and quantity, vendees and price, held in this case to be illegal under the Sherman Anti-Trust Act of July 2, 1890. *Montague v. Lowry*, 198 U. S., 88.*

A trade agreement involving the right of all parties thereto to use a certain patent, which transcends what is necessary to protect the [21] use of the patent or the monopoly thereof as conferred by law and controls the output and price of goods manufactured by all those using the patent, is illegal under the Anti-Trust Act of 1890. *Bement v. National Harrow Co.*, 186 U. S. 70, and *Henry v. A. B. Dick Co.*, 224 U. S. 1, distinguished.

While rights conferred by patents are definite and extensive, they do not give a universal license against positive prohibitions any more than any other rights do.

The Sherman Anti-Trust Act is a limitation of rights which may be pushed to evil consequences and should therefore be restrained.

The character of the Sherman Act is sufficiently comprehensive and thorough to prevent evasions of its policy by disguise or subterfuge. The Sherman Act is its own measure of right and wrong; courts cannot declare an agreement which is against its policy legal because of the good intentions of the parties making it.

A party to an agreement in restraint of trade is none the less a party to the illegal combination created thereby, because it is not subject to all the restrictions imposed upon all the other parties thereto.

A corporation having a manufactory in one State and warehouses in several other States held to be engaged in interstate commerce under the circumstances of this case.

Quere, whether one of the individual defendants in an equity case brought by the Government to dissolve an illegal combination under the Sherman Act, called as a witness by one of the other defendants in the same suit, obtains immunity from criminal prosecution as to the matters testified to.

There is no rule that civil suits brought under the Sherman Act to dissolve the combination must await the trial of criminal actions against the same defendants, and whether the trial of the civil action shall be delayed because some of the defendants refuse to testify as witnesses for other defendants is a matter in the discretion of the trial court, and in the absence of abuse not reviewable.

191 Fed. Rep. 172, affirmed.

[57 L. Ed. 107.†]

[MONOPOLY—MANUFACTURERS AND DEALERS—PATENTED DEVICE.—Agreements embracing 85 per cent of the manufacturers of, and 90 per

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† The paragraphs following, in brackets comprise the syllabus of the case as reported in volume 57, page 197, *Lawyers' Edition*, Supreme Court Reports. Syllabus copyrighted, 1912, 1913, by The Lawyers' Co-operative Publishing Company.

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cent of the jobbers in, enameled ironware, which, in addition to a provision against the marketing of "seconds," intended to carry out the ostensible object of the agreements, also provide for regulating prices through the instrumentality of a price and schedule committee, fix preferential discounts, confining them to sales to jobbers only, authorize rebates if the agreements shall be faithfully observed, and forbid all sales to jobbers not in the combination, making a condition of their entry a promise not to resell to plumbers except at the prices determined by the manufacturers, and not to deal in the products of manufacturers not in the combination—can not escape condemnation under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), because the agreements take the form of licenses from the owner of a patent for a device used in the enameling process.

[For other cases, see Monopoly, 20-23, in Digest Sup. Ct. 1908.]

MONOPOLY—CORPORATION ENGAGED IN INTERSTATE COMMERCE.—A corporation manufacturing its product in New Jersey, and buying also from other manufacturers and jobbers, which ships from there to its warehouses in Massachusetts and New York, from which sales are made in those States and in Connecticut, is engaged in interstate commerce, and as such is subject to the prohibitions of the Sherman Anti-Trust Act of July 2, 1890, against restraints of trade and monopolies.

[For other cases, see Monopolies, II, b, in Digest Sup. Ct. 1908.]

MONOPOLY—MANUFACTURERS OR DEALERS—CULPABILITY.—The culpability of a party to a combination of manufacturers and jobbers which accomplishes a restraint of trade condemned by the Sherman Anti-Trust Act of July 2, 1890, is not removed because it was restricted in less degree than the other jobbers, enjoying a certain freedom of competition to meet local conditions.

[For other cases, see Monopolies, II, b, in Digest Sup. Ct. 1908.]

APPEAL—DISCRETION BELOW—CONTINUANCE OR ADJOURNMENT.—The trial court did not abuse its discretion in denying a motion by defendants in a civil suit brought by the Government under the Sherman Anti-Trust Act of July 2, 1890, for an enlargement of time to take testimony, based upon the ground that they had been prevented by the action of the Government in instituting criminal proceedings from properly presenting their defense, in that the Government, apprehending that the witnesses for the defense were called to give them immunity from the criminal prosecution then pending, notified them that if they testified they would do so at their peril, as immunity could only be claimed by witnesses for the Government, whereupon, on the advice of counsel, they refused to testify, leaving the defendants without the benefit of the evidence which they could have given.

[For other cases, see Appeal and Error, VIII, 1, 2, in Digest Sup. Ct. 1908.]

Argument for Appellants.

The facts, which involve the legality under the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. 209, c. 647, are stated in the opinion.

Mr. Herbert Noble, with whom *Mr. Henry D. Estabrooke* and *Mr. Hartwell P. Heath* were on the brief, for appellants other than Colwell Lead Company:

[22] The gravamen of the Government's charge is that the scheme in this case amounted to a wicked conspiracy to circumvent the Sherman Act by basing it on a patented invention of slight or no importance which was used only as a subterfuge. Whether it is wicked to attempt to circumvent the Sherman Act depends somewhat upon the meaning of the Sherman Act as well as the meaning of the word "circumvent." Translated literally, according to its rhyme and not its reason, the Sherman Act is a blight upon enterprise. The venom of anarchy could not elaborate a more enervating, paralyzing proscription. All business would be under the ban of the law; with the result that it would be left to the caprice or favor of the Attorney General to give immunity to favorites or punish enemies. If the Sherman Act means this, then we make bold to say that it is the righteous duty of every lawyer to circumvent the Sherman Act if it can be accomplished.

Where a man's remedy for a wrong is barred at law he does not circumvent the law if he resorts to equity. If what was done was legal, the question of motive is clearly immaterial. *Diamond Match Co. v. Roeber*, 106 N. Y. 478; *McCune v. Norwich Gas Co.*, 30 Connecticut, 521; *Glendon Iron Works v. Uhler*, 15 Am. Rep. 599; 20 Harvard Law Rev., Nos. 4, 5, and 6.

Irrespective of patent law or patent rights, the acts of the defendants did not in any reasonable sense create a monopoly, restrain commerce, limit output, nor throttle competition, nor were they obnoxious to any fair reading of the Sherman Act. The rule of possible evil—that the mere power to do evil is equivalent to the actual doing of it would make potential bomb throwers of everyone. In the very nature of things the law may not punish anyone for the wrong he might do if he were so disposed.

Argument for Appellants.

The court below erred in not decreeing that the agreements entered into by the defendants and upon which the petition is based were lawful under the patent laws of the [23] United States and not subject to the provisions of the Sherman Anti-Trust Act.

Similar license agreements were sustained by the courts in *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. Rep. 358; *Indiana Mfg. Co. v. Case Threshing Mach. Co.*, 154 Fed. Rep. 365; *Goshen Rubber Works Co. v. Single Tube Tire Co.*, 166 Fed. Rep. 431; *Victor Talking Mach. Co. v. The Fair*, 123 Fed. Rep. 424; *Heaton Peninsular Co. v. Eureka Specialty Co.*, 77 Fed. Rep. 294.

The provisions in the license agreements as to prices were intended to enable the licensees to make a reasonable profit, so that they would be able to maintain and improve the quality of the ware and pay the royalties reserved. The owner of a patent can protect his invention by making agreements controlling the product of the use of his invention, and which admit that by the use of that invention the product is better than if made by any other known method of manufacturing the product. *Henry v. A. B. Dick Co.*, 224 U. S. 1.

The constitutional idea of a time monopoly in a new creation is profoundly wise, as all experience has demonstrated. The right to withhold the use of an invention necessarily involves a right to attach to its use any condition however arbitrary, for the public is none the poorer if the invention is never used, whereas it may be benefited if the invention is brought into use on any terms; and in any event the monopoly lapses with the lapse of time, or is perhaps made valueless by a newer invention inspired by the one it supersedes. Cases *supra* and *Bloomer v. McQuewan*, 14 How. 539, 548; *United States v. American Bell Tel. Co.*, 167 U. S. 224; *U. S. Consol. S. R. Co. v. Griffin & Skelley Co.*, 126 Fed. Rep. 364; *Rupp & Wittgenfeld Co. v. Elliott*, 131 Fed. Rep. 730; *New Jersey Patent Co. v. Schaeffer*, 159 Fed. Rep. 171; *New Jersey Patent Co. v. Schaeffer*, 178 Fed. Rep. 276; *Fonotipia, Ltd., v. Bradley*, 171 Fed. Rep. 951; *National Phonograph Co. v. Schlegel*,

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[24] 128 Fed. Rep. 733; *Edison Phonograph Co. v. Pike*, 116 Fed. Rep. 863; *Edison Phonograph Co. v. Kaufmann*, 105 Fed. Rep. 960; *The Fair v. Dover Mfg. Co.*, 166 Fed. Rep. 117; *Commercial Acetylene Co. v. Autolux Co.*, 181 Fed. Rep. 387; *Æolian Co. v. Juelg Co.*, 155 Fed. Rep. 119; *Crown Cork Co. v. Brooklyn Bottle Stopper Co.*, 172 Fed. Rep. 225; *Crown Cork Co. v. Standard Brewery*, 174 Fed. Rep. 252; *Crown Cork Co. v. Standard Stopper Co.*, 186 Fed. Rep. 841; *Cortelyou v. Lowe*, 111 Fed. Rep. 1005; *Cortelyou v. Carter*, 118 Fed. Rep. 1022; *Cortelyou v. Johnson*, 138 Fed. Rep. 110; *S. C.*, 145 Fed. Rep. 933; *Broderick Copygraph Co. v. Roper*, 124 Fed. Rep. 1019; *A. B. Dick Co. v. Milwaukee Co.*, 168 Fed. Rep. 930; *Indiana Mfg. Co. v. Nichols & Shepard Co.*, 190 Fed. Rep. 579; *Automatic Pencil Sharpener Co. v. Goldsmith Bros.*, 190 Fed. Rep. 206; *Thomas A. Edison, Inc., v. Smith*, 188 Fed. Rep. 925; *Waltham Watch Co. v. Keene*, 191 Fed. Rep. 855; *Fuller v. Berger*, 120 Fed. Rep. 274; *Broderick Copygraph Co. v. Mayhew*, 131 Fed. Rep. 92; *affd.* 137 Fed. Rep. 596.

No attack is or could be made upon the validity of the patents, because the Arrott patent has been upheld by the courts. *Mott Iron Works v. Standard Sanitary Mfg. Co.*, 159 Fed. Rep. 185.

The inventions covered by the patents are automatic devices adapted to distribute enameling powder over the surface of the various articles of sanitary enameled ironware while at a very high temperature.

Under the principle of the *Paper Bag Patent case*, 105 U. S. 766, the owner of the letters patent here might have permitted the use of his invention for the purpose of manufacturing sanitary enameled ironware upon condition that it should not be sold at all, and consequently that it might be sold upon prescribed conditions.

The court below erred in not decreeing that the agreements entered into by the defendants, and upon which the petition is based, were not in restraint of interstate [25] trade and commerce and not in violation of the Sherman Anti-Trust Act, and that the use of the patents was not a subterfuge.

Argument for Appellants.

The acts alleged in the petition so far as the evidence in the case tends to establish them do not violate the provisions of the Sherman Act. The agreements in the case at bar are not within the Sherman Act. *United States v. Winslow*, 195 Fed. Rep. 578, 592. They were open upon the same terms to all who chose to take advantage of them. *United States v. Terminal Association*, 224 U. S. 383, 398, 410.

They were, moreover, based upon patents which created a true monopoly, a grant from the sovereign—the Constitution—so that to hold that this monopoly was violative of the Sherman Act would be judicial legislation and an attack upon the whole patent system. *Henry v. A. B. Dick Co.*, 224 U. S. 16, 27, 35.

The Sherman Act and the patent laws were passed under separate grants of constitutional power and do not affect each other. *Bement v. National Harrow Co.*, 186 U. S. 70, 91; *Rubber Tire Wheel Co. v. Milwaukee R. W. Co.*, 154 Fed. Rep. 358, 362.

The true construction of the Anti-trust Act, and one not in conflict with any of the decisions, is that it does not condemn a fair and reasonable attempt to avoid loss by means of trade agreements which are intended to prevent nothing but the cutting of rates below the reasonable expense of production and reasonable profit thereon; nor is the monopolization referred to simply the complete occupation of a certain field if that occupation may be fairly accomplished. *Fonotipia, Ltd., v. Bradley*, 171 Fed. Rep. 951.

The legislative history of the act and its construction as declared in *Standard Oil Co. v. United States*, 221 U. S. 1, 58, show that it has no application to economic agreements to meet market demands. The agreements in the [26] case at bar are not within the Sherman Act, because their dominant purpose was to promote the trade of the parties, and there are in the agreements and in the acts under them none of the elements pointed out in the *Standard Oil Case* and the *Tobacco Case* as objectionable, such as enhancement of prices; limitation of output; deterioration of quality; or intimidation, coercion, or fraud.

Argument for Appellants.

On the contrary, in these agreements and acts under them, prices were not enhanced, there was no limitation of output, there was a great improvement in quality, and there was no intimidation, coercion, or fraud.

For other cases construing the act see *United States v. Du Pont De Nemours Co.*, 188 Fed. Rep. 127; *United States v. John Reardon & Sons*, 191 Fed. Rep. 454; *United States v. St. Louis Terminal Assn.*, 224 U. S. 388.

In the case at bar all manufacturers were offered, and any could secure, a similar license agreement, and it was to the pecuniary and selfish interest of the parties interested to grant licenses to as many as possible. See *Mogul S. S. Co. v. McGregor*, 23 Q. B. D. 598, A. C. [1892] 25.

For other cases holding trade agreements not to be illegal under the Sherman Act, see *Hopkins v. United States*, 171 U. S. 578, 592; *Anderson v. United States*, 171 U. S. 604; *Fonotipia, Ltd., v. Bradley*, 171 Fed. Rep. 951, 959; *United States v. Knight Co.*, 156 U. S. 1; *Bigelow v. Calumet & Hecla Co.*, 167 Fed. Rep. 721; *Camors-McConnell Co. v. McConnell*, 140 Fed. Rep. 412 and 987; *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep., 454; *Prame v. Ferrell*, 166 Fed. Rep. 702; *Packet Co. v. Bay*, 200 U. S. 179; *Philips v. Cement Works*, 125 Fed. Rep. 593; *S. C.*, certiorari denied, 192 U. S. 606.

In this case, however, the Sherman law has no application. *United States v. Winslow, supra*; *Fire E. C. Co. v. Halsted*, 195 Fed. Rep. 295.

For the cases in which it has been held that a violation of the Sherman Act is no defense in infringement suits, [27] see *Johns-Pratt Co. v. Sachs Co.*, 176 Fed. Rep. 738; *Otis Elevator Co. v. Geiger*, 107 Fed. Rep. 131; *National Folding Box Co. v. Robertson*, 99 Fed. Rep. 985; *Bonsack Machine Co. v. Smith*, 70 Fed. Rep. 383; *Strait v. National Harrow Co.*, 51 Fed. Rep. 819; *Brown Saddle Co. v. Troxel*, 90 Fed. Rep. 620; *Soda Fountain Co. v. Green*, 69 Fed. Rep. 333; *Edison El. Light Co. v. Sawyer-Man Co.*, 53 Fed. Rep. 592; *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. Rep. 306.

The claims made by the Government have not been sustained and the authorities relied upon by it can be distin-

Argument for the United States.

guished. The license agreements are entirely beneficial and have harmed no one.

The court below erred in not granting the motion of the defendants for an enlargement of time to take testimony and that the hearing of the case be postponed until the testimony of the defendants could be completed.

A motion was made at the hearing below for the enlargement of the time of the defendants to complete their testimony on the ground that they had been prevented, by the petitioner's action in instituting criminal proceedings, from properly presenting their defense.

In view of the warnings against the individual defendants testifying as witnesses, and of the necessity of standing trial upon these indictments, the individual defendants were unwilling to voluntarily appear and testify, lest by so doing they should furnish the Government with some information which might be used against them upon the said trial.

No matter how innocent a man may believe himself to be, or may be advised as a matter of law that he is, it is perfectly proper for a man to refuse to put himself in a position where what he says may tend to incriminate him if by a reasonable delay, to be granted by a court of equity, he can equally well protect himself and his property at a somewhat later date without any harm to the public.

[28] *Mr. Robert B. Honeyman*, with whom *Mr. A. Parker Smith* was on the brief, for the Colwell Lead Company, appellant.

Mr. Edwin P. Grosvenor, Special Assistant to the Attorney General, with whom *The Attorney General* was on the brief, for the United States:

This case presents the latest contrivance for evading the rules prescribed by the Sherman Act in the conduct of interstate commerce, and particularly "the rule of free competition among those engaged in such commerce." *Mr. Justice Harlan* in the *Northern Securities Case*, 193 U. S. 331. Since that act was passed in 1890 this court has had occasion to consider various forms of combinations and

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monopolization. The earliest form was that of an unincorporated association with a constitution and by-laws accomplishing unlawful restraints condemned in the *Addyston Pipe Case*, 175 U. S. 211; *Montague v. Lowry*, 193 U. S. 38; *Trans-Missouri Association Case*, 166 U. S. 290; and *Joint Traffic Association Case*, 171 U. S. 505. Destruction of competition between manufacturers through the adoption of a common selling agency given the form of a State corporation was held unlawful in the *Continental Wall Paper Case*, 212 U. S. 227. The holding company as a means of suppressing competition whether between railroads or between industrial companies received the same judgment in the *Northern Securities case*, *supra*, and in the *Standard Oil Case*, 221 U. S. 1. In *Miles Medical Co. v. Park & Sons*, 220 U. S. 373, this court pronounced unlawful a scheme of so-called agency contracts under which a manufacturer attempted to establish uniform prices on all sales by wholesalers and retailers of proprietary medicines manufactured by him. In the case against the Tobacco Trust it was held, 221 U. S. 106, that the American Tobacco Company and five other companies organized [29] under the laws of New Jersey were unlawful combinations, among other reasons because they had acquired monopolistic power with a wrongful purpose and by methods inconsistent with a natural and normal expansion of business. In *United States v. St. Louis Terminal Association*, 224 U. S. 383, it was decided that a terminal association of railroads is an illegal restraint so long as it does not act as the impartial agent of every line which, owing to geographic conditions, is under compulsion to use its instrumentalities.

The case at bar is an instance of an attempt to conceal an agreement fixing prices and interfering with competitors under the guise of a legitimate licensing arrangement for the use of patents. The appellants incorporated the unlawful restraints in so-called "license agreements," each corporation defendant entering into one of these "license agreements" with the same contracting party, to whom three patents had been transferred before the signing of the contracts.

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In every case we must use the standard of reason for the purpose of determining whether or not an act or alleged restraint of commerce has brought about the harm from which the Sherman Anti-Trust Act is intended to guard the people. *Standard Oil Case, supra*.

If the acts complained of have caused the wrongs which the statute forbade, resort to reason is not permissible to allow that to be done which the statute prohibits. It matters not what form the combination may take, or what garb or dress it may put on, for if it directly restrain commerce it falls within the operation of the statute. *Standard Oil Case*, p. 106; *Northern Securities Case*, 193 U. S., 197, 347.

The appellants adopted in this case a form of combination different from any heretofore considered by this court. But it is the form alone that is new. Behind the grinning mask of the "license agreement" is the common, [30] vulgar type of monopoly which many times has been condemned by this court, dangerous alike to "individual liberty and the public well-being." *American Tobacco Co. Case*, 221 U. S. 183.

Continental Wall Paper Co. v. Voight, 212 U. S. 227, and *Miles Medical Co. v. Park*, 220 U. S. 373, dispose of this case.

In the first case the element of combination is present which is absent in the second. In each case the contracts were devised with the object of controlling the resale prices of jobbers and of eliminating all competition between jobbers as to prices. The two cases supplement each other, one holding that manufacturers can not combine through a selling agency and the other that a manufacturer can not dictate the prices on all sales of his products by all dealers at wholesale and retail.

All combinations obstructing the free flow of interstate commerce or interfering with the citizen's right to engage in commerce or suppressing competition in commerce are unlawful. These propositions are past dispute.

The restraints complained of by the Government substantially and directly operate upon commerce in unpatented enameled ware and only indirectly relate to the use of the patented article or dredger.

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It was competition in commerce in unpatented bathtubs which appellants destroyed, and upon persons engaged in commerce in that ware they imposed their unreasonable restraints.

While it is true that the property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way or at a specified place or for a specified purpose, nevertheless restraints so imposed must be legal and reasonable conditions attached to the use of the patented article. They can not be restrictions inherently violative of some substantive law. *Henry v. Dick Co.*, 224 U. S. 1, 24, 26.

[81] In the case at bar the restrictions were not reasonable and legal conditions attached to the use of the patented machine, for they restrained trade and promoted monopolization of commerce in articles not patented. Moreover, the restrictions were not attached to the use of the patented tool, but applied to acts subsequent to the use; that is, to what was done after the use of the tool embodying the invention. The restraints were laid upon the distribution of and commerce in ware in the making of which the tool was used.

In the *Dick Case*, *supra*, the restriction provided that in the use of the mimeograph the only paper used should be paper which had been supplied by the patentee. Therefore the condition became effective at the time of use of the patented article. There was no attempt to control the output of the mimeograph, or to fix the price at which the users of the mimeograph should sell the mimeographed copies.

Breach of the conditions in the Wayman licenses could occur only after the use of the patented Arrott dredger, for those conditions applied solely to acts performed after the use. Acts in interstate commerce subsequent to the use are not related to the use, and accordingly conditions attached to those subsequent acts do not qualify the use. Therefore it is clear that sales to non-licensed jobbers or sales at prices different from the established prices do not in any sense constitute a use of the invention in a "prohibited way," but are, in fact, violations of those terms of the contracts which apply to the disposition of non-patented articles.

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It is immaterial whether or not the patented tool is essential in producing the enamel ware, for in any event no restriction laid upon the distribution of the ware in commerce can relate back so as to qualify even remotely the use of that tool during the manufacture of the ware.

[32] The license agreement sustained by the Dick decision created no monopoly in unpatented things, for it left the whole world free to manufacture and sell paper and ink. It reserved to the patentee the sole right to supply specified unpatented articles to specified persons, but it did not prevent any other persons manufacturing and distributing those unpatented articles generally to all except to those who had bought the patented mimeograph. It gave to no one control either over the source of supply of the unpatented articles or over the demand for those articles, except in respect to the person who bought the patented mimeograph. As to him only was the market curtailed and the demand controlled.

On the other hand, in the case at bar the direct object of the appellants was to monopolize commerce in articles unpatented and of universal use. The combination directly affected and absolutely controlled every phase of that commerce. It not only dictated the prices on sales from the manufacturers to the jobbers and every term and condition applicable to those sales, but also regulated in the same detail the sales of the jobbers to the plumbers. Moreover, every restriction contained in the agreements has been cruelly and oppressively enforced and maintained.

The patentee who grants a license to make and use the patented machine has no control by virtue of his patent over the article made with the help of the patented machine. *Keplinger v. De Young*, 10 Wheat. 358; *Merrill v. Yeomans*, 94 U. S. 568.

No word or phrase in the Sherman Act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combinations. *United Shoe Machinery Company v. La Chappelle*, 99 N. E. Rep. 289.

The patent laws and the Sherman law are not conflicting, but in their respective domains are mutually exclusive of each other.

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[33] The right conferred by the patent laws is not the right to make, use, and vend the thing patented, for this right exists by virtue of the common law and independently of the patent statutes; this right to make, use, and sell the patented device is a natural right. The only right which the letters patent grant is the right to exclude all other persons from making, using, or vending the thing patented without the permission of the patentee. *Bloomer v. McQuewan*, 14 How. 589, 548; *Patterson v. Kentucky*, 97 U. S. 501, 506.

The right to sell a patented article is subject to the police regulation of the State. *Patterson v. Kentucky*, 97 U. S. 501, 505; *Webber v. Virginia*, 103 U. S. 344, 347; *In re Brosnahan*, 18 Fed. Rep. 62, 165.

In the cases last cited the exercise of the police power of a State in prohibiting the sale of patented articles was held not to be in conflict with the patent laws of Congress. If the State may prohibit altogether the sale of patented articles because of injury resulting from such sale to its citizens, it follows that the State may prohibit the sale of patented articles pursuant to combinations in restraint of intrastate trade and commerce, for such combinations are equally harmful to the public. In the one case the State is prohibiting any sale, in the other case it is merely regulating the sale of the patented article in so far as it declares that no such sale shall be made under any unlawful combination monopolizing or restraining intrastate commerce. In either case the State is exercising its police power to protect its citizens; neither exercise of power conflicts with the patent laws. The reason is clear. The regulation of the State is being applied to natural rights and not to patent rights. The right to sell, a common-law right, is denied by the State in the one case and regulated in the other, the State acting in each case for the good of the public.

In passing the so-called anti-trust statutes Congress and a State legislative body act under different sources [34] of power, but in each case the exercise of the power arrives at the same result, namely, prohibition of restraints of trade and of monopolies. The effect of the State act and of the Sherman Act is the same; that is, the two acts relate to

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and operate upon the same subject matter, although one is enacted under the police power of the State and the other under the authority of Congress to regulate interstate commerce. If the exercise of the police power of the State does not encroach upon the domain of the patent laws, it can not in reason be argued that to include within the operation of the Sherman Act combinations restraining trade is to subtract from the monopoly of the patentee.

Whether appellants were entitled to further time for the taking of testimony was a matter resting in the discretion of the lower court. The Sherman Act provides four remedies: A criminal proceeding, a suit in equity, forfeiture of property, and an action in treble damages.

The wisdom of the law and the effect of rigid enforcement are not matters for consideration by the court, but by other departments of the Government. *Armour Packing Co. v. United States*, 209 U. S. 56, 82.

Mr. Justice McKenna delivered the opinion of the court.

Suit by the Government against appellants for a violation by them of the act of July 2, 1890, 26 Stat. 209, c. 647, commonly known as the Sherman Anti-Trust Act.

A decree was entered in favor of the Government, from which appellants (designated herein as defendants) have prosecuted this appeal. 191 Fed. Rep. 172.

There are sixteen corporate and thirty-four individual defendants, the latter, with the exception of Edwin L. Wayman, being the officers, presidents or secretaries, of the companies.

[85] The corporate defendants were alleged to be the manufacturers of enameled iron ware in various places in the United States, manufacturing 85 per cent of such ware and engaged in interstate commerce in such ware throughout the United States and with foreign countries in competition with one another and with certain other manufacturers of such ware, and that in 1909, or early in 1910, they entered into and engaged in a combination and conspiracy to restrain such trade and commerce.

The defendants denied the charges against them, Wayman doing so in a separate answer. The Colwell Lead

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Company denied that it was engaged in interstate commerce.

A great deal of testimony was taken and the case quite elaborately argued, but in the view we take of it it is in comparatively narrow compass, depending upon the application of well-settled principles.

The corporate defendants are manufacturers of sanitary enameled iron ware, such as bath tubs, wash bowls, drinking fountains, sinks, closets, etc. The enameling consists in applying opaque white glass to iron utensils, first in the condition of a liquid and, second, in the form of a powder. The process consists in heating the utensil to a red heat and then sifting upon it the enameling powder. The powder is fused by the high temperature and forms on the utensil a hard, impenetrable, insoluble, smooth, and glossy surface.

Prior to the invention of James W. Arrott, jr., covered by letters-patent issued September 26, 1899, the enameling powder was applied by a sieve attached to a long handle which was held by the workman with one hand and the sieve made to vibrate by the workman striking the handle with his other hand, thereby sifting the powder over the surface of the ironware. The implement was an imperfect one, not easily handled, and by its use the workmen were subjected to intense heat and physical strain. The [36] flow of the powder beside was not continuous; it was cast upon the metal in intermittent puffs, causing in many instances an unequal distribution of the powder and producing defective articles which either had to be thrown away or sold as "seconds." With Arrott's invention these evil results are lessened or disappear. The sieve is mechanically vibrated very rapidly, causing, instead of an intermittent flow of the powder as in the hand process, a practically continuous flow. Both hands of the workman may be used to guide and direct the sieve. The advantages of the instrument over the hand process are decided. It is more efficient and more economical. It makes a better article and in less time. There is no waste in defects or "seconds." The workman is relieved to some extent from "fierce heat conditions," to quote from the answers.

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At the time of the contracts which are attacked by the Government the Standard Sanitary Manufacturing Company was the owner of the patent and manufacturer of 50 per cent of the ware, and used in its production the patented device. Some of the other manufacturers were infringing and controversies existed. Some yielded to its validity, others contested it. It was sustained by the courts in several cases.

We have gone through this detail to exhibit the conditions, as asserted by defendants, which confronted them and induced their contracts. In further display of it we quote Wayman's answer as follows:

"For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user of such means open to a suit for infringement by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention were unable to successfully compete with those using the Arrott invention, and, moreover, produced a [87] disproportionate number of defective, unsightly and substantially unsaleable articles. The consumer was deceived and defrauded and the use of sanitary enameled iron ware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective."

On the situation thus asserted to exist the defendants build their defense, contending that Wayman saw its evils and conceived the way to correct them; and insist that the following facts are established by the evidence: Wayman was familiar, through his connection with another enameling company called the Seamless Steel Bath Tub Company, with the enamel-ware trade and had become convinced of the advantages, indeed, necessity, of the use of the Arrott invention. He tried to secure it, but the Standard Company seemed unwilling at that time to confer its utility upon other companies, and pending the negotiations the Seamless Company failed and Wayman turned to other plans, one of which resulted in the contracts under review.

As early as 1908, impressed with the importance of the Arrott patent, he endeavored to have the Standard Com-

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pany grant licenses to other companies in order to improve trade conditions, and to this end he tried to interest other gentlemen in the project. The Standard Company was unwilling to grant, and other manufacturers were equally disinclined to accept them. He then conceived the idea of a holding company, but this failed also, the Standard still being unyielding, stating by one of its officers that "his company was unwilling either to sell the Arrott patent or to enter into any arrangement which would lessen the advantage which it had by reason of the ownership of the Arrott patent." The plan was, therefore, abandoned.

In August, 1909 (we are still following the version of the testimony given by counsel for defendants), it was suggested to Wayman by a person connected with one [88] of the manufacturing companies that he (Wayman) apply for the position of secretary of the Association of Sanitary Enameled Ware Manufacturers which was about to be re-organized. The position, it was said, would give Wayman an excellent opportunity to continue his efforts to buy the Arrott patent and establish such relation with the manufacturers of enameled ware as would enable him to present in the most favorable manner his ideas in regard to the advantages of patent licenses under the Arrott patent. This association was a pure trade organization and not formed to control or regulate prices. Wayman applied for and obtained the position and commenced again negotiations for the Arrott patent and persisted, against the apparent reluctance of the Standard Company to give up the advantages of the patent. Finally he impressed the manager of the Standard factories with the greater advantages which would come to his company by the elimination of "seconds" and removing them as competitors of the better articles of the Standard, confining the competition to such articles of which the Standard produced 50 per cent. The manager of the Standard and that company yielded to the representation of these advantages.

These advantages are dwelt on and made much of by counsel and they quote testimony to display their extent. "Seconds," as we have said, were articles of inferior or

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defective manufacture, and as their inferiority was not apparent they could be represented and sold as of standard quality. Such deception, it is asserted, was frequently practiced, and the articles turning out defective discredited enamel ware, gave it a bad reputation, and there was a growing difficulty to maintain or extend its sale. With "seconds" out of the way, it may be conceded, as it is contended, that only honest articles were available to plumbers, jobbers, and builders.

The Standard Company fixed a price upon the Arrott patent and gave Wayman an option upon it. He, in the [39] following December, secured also an option from the J. L. Mott Iron Works upon a patent called the Dithridge, and from the L. Wolff Manufacturing Company an option upon the Lindsay patent. These patents were infringements of the Arrott device. Thus equipped, Wayman proceeded to engage the manufacturers in his proposition.

This summary of the situation counsel have supplemented by a declaration of motives. Counsel say that Wayman and the manufacturers were advised by able and competent lawyers of the legality of their plan. "Wayman's motive," it is asserted, "was to make money for himself, not as a manufacturer but as the owner of a patent, receiving royalties from those whom he licensed to use his patented invention." The form of his license, it is further asserted, followed the precedents and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it, or to grant it upon such terms as he may choose to impose. Such being his motive and such being his right, he, it is contended, negotiated with and contracted with the manufacturers of enameled ware. And their motives also are attempted to be justified, though the necessity for doing so is disclaimed.

Wayman's right, it seems to be contended, is all sufficient, and that the manufacturers only paid the price that he could legally demand. As the demand was legal, it is argued, the payment of the price could not be illegal. But the Government asserts subterfuge, illegal purpose liveried in legal forms to give color of right to illegal practices.

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The charge challenges consideration of the relation between that which the manufacturers engaged to do and the protection of the exclusive right attached to the invention. Upon such consideration how far the licenses transcend such right and violate the Sherman Law we can then determine. And we shall keep in mind and apply [40] the principle expressed in *Bement v. National Harrow Company*, 186 U. S. 70, 92, that the Sherman Law "clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers."

In our inquiry we shall accept *arguendo* the statement of defendants of their inducement and purpose. We say "*arguendo*" because the asserted inducement and purpose are denied by the Government, it contending, as we have seen, that the Arrott patent was but a pretense and that the agreements were put in the form of licenses of it to at once accomplish and palliate evasions of the law. The fact being in controversy, we place our consideration and decision on other elements. In other words, we will consider the case from the standpoint of defendants' view of the situation, with comments as we proceed as to what they did to meet it and how far what they did accorded with or transgressed the law.

The contention of the defendants then is that the Standard Company's position and power as owner of the patent, and Wayman's were identical. What it could have done, it is contended, he could do, and its relation to the trade and the relation of other manufacturers to the trade clearly demonstrate, it is further contended, that as that company could have made the contracts, Wayman could do so.

To support the contention defendants represent the Standard as the dominant (it produced 50% of the articles) and the only honest manufacturer pointing out to other manufacturers the worthlessness of their output, they not

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having the Arrott patent; also the dishonesty of their output, they putting out "seconds," the inferiority [41] of which was "discernable only by experts"—thereby defrauding the public, "discrediting the ware and demoralizing the market and business." To avert these evil results, it is represented that the Standard was willing to forego the advantages which its ownership of the Arrott patent gave it and confer them upon the other manufacturers. But upon terms. "First and foremost" it was to be agreed that no "seconds" should be marketed. In the second place, a standard price must be agreed to so that henceforth rivalry should be "in the quality of the ware turned out at a uniform price or in any other collateral inducement to the purchaser" that would not "affect the quality of the ware." Wayman's agency and office, it is represented, was that of "watching all parties and insuring their fidelity to the agreement by the payment of a royalty for the use of the invention." And this, it is said, is "all there is in substance or principle to the case at bar, except that Mr. Wayman, instead of the Standard Company, was the originator of the scheme and that he persuaded his co-defendants to enter into it."

But the scheme has other features and effects which counsel overlook or ignore. It is immediately open to the criticism that its parts have no natural or necessary relation. What relation has the fixing of a price of the ware to the production of "seconds"? If the articles were made perfect their price in compensation of them and by unfettered competition would adjust itself. To say otherwise would be in defiance of the examples of the trading and industrial world. Nor was a combination of manufacturers necessary to the perfection of manufacture and to rivalry in its quality. And it may be asked if such perfection and its protecting influence against deception and the ruinous depression of prices were so desirable and potent as it is contended that they were, why were they not extended to "baths," the most important of the articles in the trade? It is not an adequate answer to say that [42] there was a time guarantee of them even though it was given to all of them, as it was not. The justification of defendants is based not on the responsibility

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of manufactures but on the integrity of the articles assured by the use of the Arrott device.

It is the foundation of defendants' argument that to make the use of that device universal was the prompting of Wayman's energies to unite the manufacturers and to remove the evils which beset the trade and which were "discrediting the ware and demoralizing the market and business." It was the representation of the advantage, we are told, of such results that broke down the resolution of the Standard Company not to share the use of the device with other manufacturers. But granting that there was provision or security against the production of "seconds" in all of the articles, it seems from what we have said above that all of the substantial good which is asserted to have been the object of the agreements could have been attained by a simple sale of the right to use the Arrott patent, conceding to it the dominant effect which is attributed to it. Nor is the justification of defendants made more adequate by the representation that "Wayman's motive was to make money for himself, not as a manufacturer but as the owner of the patent, receiving royalties from those whom he licensed to use his patented invention." Wayman testified to another motive. By fixing prices "he hoped," he said, "as one of the features of the license agreements, to enable the companies to abolish ruinous competition" and to get a "revenue for each of the companies to enable them to make a reasonable profit."

But motives and inducements may not be easily estimated, and we will pass to a consideration of the agreements. On March 30, 1910, the Manufacturers' Association passed a resolution, and a committee of five was constituted, to be known as the price and schedule committee, to which the license agreements and resale agreements should be referred. This committee was to interview the various manufacturers and obtain their consent to the agreements which were to become effective "when the consent of 83 per cent of the production" was had. The signatory manufacturers agreed to "give their prompt co-operation to the matter in question."

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At the same time the following resolution was passed:

"Whereas, a proposition is pending for a license agreement and a resale price for the benefit of the jobbing trade, and

"Whereas, long-term contracts are a menace to said proposition,

"We, the undersigned, manufacturers of enameled ware, hereby agree to take no orders for delivery beyond May 31, 1910.

"This agreement is not binding upon the signers unless all members of the Enameled Ware Manufacturers' Association are parties thereto and append their signatures.

"The within is agreed to."

At the same meeting a memorandum of agreement was proposed which was to be executed with Wayman as licensor of various patents covering pneumatic dredgers. The agreement covered selling schedules of the ware and provided for the royalties to be paid; the selling price to the jobbers to be established by the licensor through a committee appointed by the various manufacturers. It provided penalties for the violation of the price regulations, and preferential discounts (discounts allowed to certain manufacturers), from the selling prices. Such discounts were to be allowed on sales to jobbers only.

Such details as might "be necessary for the perfection of the arrangement" were reserved for the next meeting of manufacturers. After this meeting a circular letter was sent by Wayman to all manufacturers apprising them of what had transpired, the attention that had been [44] given the subject, and informing them that "the final license agreement papers" would be executed at the next meeting to be held in May.

The license agreement was subsequently executed. It granted to the licensee the right to use in the manufacture of enameled ware the Arrott patent, also a patent to E. Dithridge for a pneumatic sieve and a patent to William Lindsay for an "Enameling powder distributor." It released the claims for past infringement so long as the licensees operated under the license. It fixed royalties of \$5.00 per day for each furnace, subject to a diminution of like amount for furnaces shut down for more than six consecutive working days. It fixed preferential discounts from the regular selling prices, confining them only to sales by the manufacturers to jobbers. And it was provided that no

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goods manufactured under the license should be sold unless they bore a registered label (except where otherwise specified) owned by the licensee and in addition thereto a license tag or label approved by the licensee placed in a visible position thereon.

The provision for prices was as follows:

"The Licensor agrees that he will employ a commission of six (6) persons, of which he is to be one and to act as chairman thereof, five of whom shall be designated by a majority of the parties holding licenses similar to this license, which commissions shall have supervision of all the relations and transactions between the parties hereto under this agreement, but it is understood that where a member of said commission, or his company, shall be directly interested in any question of a violation of the license to be decided by the said commission, said member shall be disqualified and a temporary member shall be appointed in his place by the remaining members of the commission.

"All terms and conditions relative to prices and discounts now established by the Licensor and set forth in [45] the annexed schedules and made a part hereof, shall remain in force and effect until other terms, conditions, and preferential discounts are substituted therefor by the Licensor, which substitution can only be made by him with the approval of a majority of the members of the commission, hereinbefore prescribed. Notice of such changes and substitutions shall be given from time to time in writing by the Licensor to the Licensees. The Licensee covenants to adhere to and maintain such terms, conditions, regulations, prices and preferential discounts as may be established by the Licensor, from time to time, and the Licensee further agrees to sell no 'seconds' or 'Bs' covered by Schedules 4, 4½, 5, and 6." (Italics ours.)

The restrictions as to prices at which the goods were to be sold did not apply to those sold and exported to foreign countries. Such sales were required, however, to be proved to the licensor.

There was a provision for the return of 80 per cent of the royalties paid if the agreement should be complied with. These royalties, called in the agreement "Royalty Rebates," were forfeited if the provisions of the agreement should be violated in any particular.

The foregoing constitute the essential provisions of the manufacturers' agreements and it will be observed what little space is given to "seconds," though it is asserted in the argument, as we have seen, that to get rid of the evils

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of their production and sale was the chief impulse to the agreements. The covenant as to "seconds" was expressed by the words which we have italicized in the provision relating to prices and discounts quoted above. The schedules referred to are found in the paragraph providing for preferential discounts and cover all articles but baths, these being described in schedules 1, 2, and 3.

There was also a jobber's license agreement that bore at the top the note that it "must be executed by the purchaser in order to purchase licensed sanitary enameled [46] ware." It conveyed to the jobber the right to buy and sell such ware, provided for certain discounts and details as to shipments and deliveries, and that the sales were to be made "by the purchasers at prices to be established and prevailing in the various zones into which the goods were shipped, regardless of the point of purchase." There was a provision for the payment of the purchase price at certain rebate periods if the agreement should be complied with. The resale prices as established from time to time were required to be maintained by all jobbers and dealers, and sales could not be made from one jobber to another for any better prices than "established by the sheets," and the purchaser agreed to "observe and strictly maintain * * * the selling prices as they are set forth in the schedules and observe and adhere to the rules and regulations as embodied in the price sheets" or embodied in price sheets which might be issued by or under the authority of the licensor. Articles might be added to or removed from the schedules at any time. The purchaser also agreed during the life of the contract not to purchase, sell, advertise, or solicit orders for, or in any way handle or deal in, sanitary enameled iron ware of any manufacturer not licensed under the letters-patent enumerated in the agreement, except with the express written permission of the licensor. A breach of any of the conditions subjected the contract and all unfilled orders to cancellation, the forfeiture of rebates and the power to obtain the ware manufactured under the letters-patent from any of the licensed manufacturers. The purchaser further agreed not to sell any goods on hand manufactured in accordance with the

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patents, irrespective of by whom manufactured, except in accordance with the prices, conditions and regulations of sale established by the licensor.

The price list contained a notice to the jobbers' salesmen that the agreements executed by their companies [47] required them to resell the various licensed products at no better prices, terms, or other regulations than therein established. And further, as changes, additions, and eliminations occurred, new sheets would be issued promptly.

These are the main outlines of the agreements, and, as emphasizing them, Wayman directed the manufacturers at the time they sent out the jobbers' agreements to also send with them a letter containing the following: "It is necessary for you [the jobbers] to execute these contracts before we [the manufacturers] can sell you licensed sanitary enameled ware." This provision was enforced, as indicated by letters in the record. It was also the condition expressed by Wayman in his correspondence with other manufacturers whom he tried to induce to accept licenses and become parties to the agreements. In a letter to a jobber Wayman expressed the hope that the jobber could see his way clear to execute the agreement, as it covered "a matter entirely for the jobbers' benefit." He further stated, "The Cedar Rapids Pump Company of your city have executed the agreement, and I hope you will co-operate immediately with your local competitors, which will be much more advantageous than a continuous cut market."

In this statement certain things are prominent. Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry [48] was not to resell to plumbers

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except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent of the manufacturers and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument "cash bail." The royalty for each furnace was \$5.00, 80 per cent of which was to be returned if the agreement was faithfully observed; it was to be "forfeited as a penalty" if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent of the jobbers in number and more than 90 per cent in purchasing power joined the combination.

The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the *Bement Case*. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry v. A. B. Dick Co.*, 224 U. S. 1, which contravenes the views herein expressed.

The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manu-[49] facturers and dealers in tiles combined them in *Montague & Co. v. Lowry*, 193 U. S. 38, which combination was condemned by this court as offending the Sherman law. The added element of the patent in the case at bar can not confer immunity from a like condemnation, for the reasons we have stated. And this we say without entering into the consider-

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ation of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection." *United States v. American Tobacco Co.*, 221 U. S. 106, 181. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts can not be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results. *United States v. Trans-Missouri Freight Asso.*, 166 U. S. 290; *Armour Packing Co. v. United States*, 209 U. S. 56, 62.

The Colwell Lead Company asserts the legality of the license agreements as the other defendants do, and, besides, urges that it was not engaged in interstate commerce but that it only sold to plumbers and that none of the price restrictions was applicable to it, nor was it [50] at any time in any relations whatsoever with the other defendants. It asserts that it was itself a jobber and therefore had no occasion to deal with jobbers and that it was not present nor represented at any of the meetings preceding the license agreements.

It does appear, however, that the company was a member of the association of manufacturers, an association which, we have seen, passed the first resolution in regard to the license agreement, and the president of the company when addressed on the subject of the agreement expressed an appreciation of it provided all manufacturers should "sign

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up." He, however, reserved final judgment until he could go over the matter in detail with Wayman, who had addressed him, and declared that he would "be greatly influenced by what other manufacturers do."

There is a letter in the record, about which, however, there is some dispute, purporting to have been written by the president of the company to Wayman, in which the latter's interpretation of a previous letter was said to be "entirely correct," and which contained the following: "We will not require any preferentials below the lowest price made by the Standard Sanitary Manufacturing Co." There can be little doubt of the genuineness of the letter, and it is certain that the company assented on the twenty-fifth of May, 1910. Its license, however, was modified in order that it might meet local competition in New York, its business being, it is contended, mostly local.

It appears from the testimony that the company was a manufacturer and a jobber, manufacturing about one-half of what it sold. As a jobber it bought goods from other manufacturers but it denies there was an agreement as to prices with such manufacturers.

The testimony as to the State or interstate character of its business is that it manufactures at Elizabeth, N. J. [51], and buys also from other manufacturers and jobbers. It ships from there to its warehouses in New York, Worcester, Mass., and Brooklyn. The trade of its Worcester branch covers about two hundred miles around Worcester, its efforts being to localize its business. It is doubtful, it is testified, if the trade goes beyond Massachusetts, the trade there being circumscribed. Sales in Connecticut are made through the New York office from the ware-rooms.

It is manifest that the Colwell Company was a party to the combination and was also engaged in interstate commerce. The fact that its trade was less general than that of the other manufacturers and jobbers does not take from it the character of an interstate trader. The fact that it was restricted in less degree than the other jobbers, given a certain freedom of competition to meet local conditions in New York, diminishes only the degree of culpability

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but does not entirely remove it. Indeed, it may be said that such freedom does not even diminish culpability. It is a concession, which may be made a means of crushing competition where it is most formidable.

Error is assigned on the action of the Circuit Court in not granting a motion made by defendants for an enlargement of time to take testimony on the ground that they had been prevented, by the action of the Government in instituting criminal proceedings, from properly presenting their defense.

The question arose upon the action of witnesses who were subpoenaed and called by the Colwell Lead Company, they being officers of some of the other manufacturers. The Government apprehending, and as it now contends, that the witnesses were called to give them immunity from a criminal prosecution which was then pending in Michigan, notified them that if they testified they would do so at their peril, as immunity could only be claimed by [52] witnesses for the Government. The witnesses thereupon, upon the advice of counsel, refused to testify, leaving, as it is contended, the Colwell Company particularly, and the other defendants as well, without the evidence such witnesses could have given and which, it is said, they did give subsequently in the criminal trial.

Whether the testimony, if given, would have conferred immunity we are not called upon to determine. The only question is as to the extent of the court's discretion in such circumstances. The Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government; the dependence of their trials can not be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the Government there may be an action for damages by a

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"person injured by reason of anything forbidden by the act." Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs the danger of incrimination can not be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar.

Decree affirmed.

UNITED STATES *v.* UNION PACIFIC RAILROAD COMPANY.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

No. 446. Argued April 18, 22, 23, 1912.—Decided December 2, 1912.

[226 U. S. 61.]

The purchase by the Union Pacific Railroad Company of forty-six per cent of the stock of the Southern Pacific Company, with the resulting control of the latter's railway system by the former, is an illegal combination in restraint of interstate trade within the purview of the Sherman Anti-Trust Act of 1890 and must be dissolved.^b

The Sherman Anti-Trust Act of July 2, 1890, 26 Stat. 209, c. 647, applies to interstate railroads which are among the principal instrumentalities of interstate commerce.

The Sherman Act is intended to reach and prevent all combinations which restrains freedom of interstate trade, and should be given a reasonable construction to this end.

The opinions in *Standard Oil Co. v. United States* and *United States v. American Tobacco Co.*, 221 U. S. 1 and 106, contain no suggestion that the decisions of the court in the *Trans-Missouri* and

* For the opinion of the Circuit Court (188 Fed. 102), see *ante*, page 308. For opinion as to form of mandate (226 U. S. 470), see *post*, page 687.

^b Syllabus and statements of arguments copyrighted, 1912, 1913, by The Banks Law Publishing Company.

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Joint Traffic cases were not correct in holding the combinations involved to be illegal while applying the rule that the statute should be reasonably construed.

The Sherman Law prohibits the creation of a single dominating control in one corporation whereby natural and existing competition in interstate trade is suppressed; such prohibition extends to the control of competing interstate railroads effected by a holding company as in the Northern Securities case, and to the purchase by one of two competing railroad companies of a controlling portion, even if not, as in this case, a majority of the stock of the other.

The Sherman Law, in its terms, embraces every contract or combination in form of trust or otherwise or conspiracy in restraint of interstate trade.

Congress is supreme over interstate commerce, and a combination which contravenes the Sherman Law is illegal although it may be permissible under, and within corporate powers conferred by, the laws of the State where made.

Courts should construe the Sherman Law with a view to preserve free action of competition in interstate trade, which was the purpose of Congress in enacting the statute.

Competition is the striving for something which another is actively seeking and wishes to gain.

Competition between two trans-continental railway systems such as the Union Pacific and Southern Pacific includes not only making of rates but the character of service rendered and accommodation afforded; and the inducement to maintain points of advantage in these respects is greater when the systems are independent than when the corporation owning one of the systems also dominates and controls the other.

The Union Pacific and Southern Pacific are competing systems of interstate railways and their consolidation by the control of the latter by the former through a dominating stock interest does, as a matter of fact, abridge free competition, and is an illegal restraint of interstate trade under the Sherman Law.

In this case *held*, that while there was a great deal of non-competitive business, a sufficiently large amount of competitive business was affected to clearly bring the combination made within the purview of the Sherman Law.

In this case also *held*, that the necessity of the Union Pacific to obtain an entrance to San Francisco and other California points over the lines of the Southern Pacific was not such as to justify the combination complained of in this case in view of the provisions for a continuous railroad to the Pacific coast and for interchange of traffic without discrimination contained in the acts of July 1, 1862, 12 Stat. 489, 495, § 12, c. 120, and of July 2, 1864, 18 Stat. 263, 262, § 15, c. 216.

Doubtless courts could restrain one railroad constructed under the acts of July 1, 1862, and July 2, 1864, from making discriminations,

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contrary to the provisions of those acts in regard to interchange of traffic, against another railroad also constructed under those acts.

The obligation to keep faith with the Government in regard to management of railroads constructed under acts of Congress continue notwithstanding changed forms of ownership and organization, as does also continue the legislative power of Congress concerning such railroads.

Although a railroad corporation may lawfully acquire that portion of another railroad which connects, but does not compete, with any part of its own system, it may not acquire the entire system a substantial portion of which does compete with its lines.

The effect of such a purchase and its legality under the Sherman Law may be judged by what was actually accomplished, and the natural and probable consequences of that which was done.

In determining the validity of a combination the court may look to the intent and purpose of those conducting the transaction and to the objects had in view.

While in small corporations a majority of stock may be necessary for control, in large corporations, where the stock is distributed among many stockholders, a compact united ownership of less than half may be ample to control and amounts to a dominant interest sufficient to effect a combination in restraint of trade within a reasonable construction of the Sherman Law.

In applying the general rules as to relief under the Sherman Law as declared in *Standard Oil Co. v. United States*, 221 U. S. 1, 78, the court must deal with each case as it finds it; and where the combination has been effected by purchase by one corporation of a dominant amount of stock of its competitor the decree should provide an injunction against the right to vote stock so acquired, or payment of dividends thereon except to a receiver, and any plan for disposition of the stock should be such as to effectually dissolve the unlawful combination.

Whether the decree can provide for the purchase by the Union Pacific of such portions of the Southern Pacific as are only connecting and are not competitive and which effect a continuous line to San Francisco, not now determined, with leave to the District Court to consider any plan proposed to effect such results. [64] Unless plans for dissolution are presented to, and affirmed by, the District Court within a reasonable period, in this case three months, that court should proceed to dissolve the combination by receiver and sale.

The decree below, dismissing the bill generally, being affirmed by this court as to all matters other than the purchase of Southern Pacific stock, is reversed in part, and the District Court retains its jurisdiction over the cause to see that the decree outlined by this court in this opinion is made effectual.

188 Fed. Rep. 102, reversed in part.

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[57 L. Ed. 124.*]

[**MONOPOLY—COMBINATION BY CARRIERS—STOCK CONTROL.**—1. A combination which places railroads engaged in interstate commerce in such a relation as to create a single dominating control in one corporation whereby natural and existing competition in interstate commerce is unduly restricted or suppressed constitutes a restraint of interstate commerce forbidden by the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), whether accomplished through a holding company or through a direct transfer of a dominating stock interest from one company to the other.

For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.

MONOPOLY—COMBINATION BY CARRIERS—STOCK CONTROL.—2. A purchase by one railway company of a dominating stock interest in another, though legal in the State where made, and within corporate powers conferred by State authority, can not escape condemnation under the Sherman Anti-Trust Act of July 2, 1890, if it contravenes the prohibitions of that statute against combinations and conspiracies in restraint of trade, enacted by Congress in the exercise of its supreme authority over interstate commerce.

For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.

MONOPOLY—COMBINATION BY CARRIERS—STOCK CONTROL.—3. The acquisition by the Union Pacific Railroad Company, then operating a line from Missouri River points to Portland, and thence to San Francisco by steamship connection, of 46 per cent of the outstanding capital stock of the Southern Pacific Company, with the intent and result, not only of securing the California connection at Ogden over the Central Pacific line, and thus effecting such a continuity of the Union Pacific and Central Pacific lines from the Missouri River to San Francisco, as was contemplated by the acts of July 1, 1862 (12 Stat. at L. 489, chap. 120), July 2, 1864 (18 Stat. at L. 356, chap. 216), and June 20, 1874 (18 Stat. at L. 111, chap. 331, U. S. Comp. Stat. 1901, p. 3577), but of obtaining the dominating control of the entire Southern Pacific system, consisting of lines by water and rail, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific coast points, with various branches and connections, besides a steamship line from San Francisco to Panama, and from San Francisco to the Orient, and a half interest in another line between the two latter points, which system was actively competing with the purchasing road for interstate business, large in volume, though

* The paragraphs following, in brackets, are from the syllabus of the case, as reported in volume 57, page 124, Lawyers' Edition, Supreme Court Reports. Syllabus copyrighted, 1912, 1913, by The Lawyers' Co-operative Publishing Company.

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small in comparison with the total traffic carried, creates, contrary to the act of July 2, 1890, a combination in restraint of interstate trade.

For other cases, see *Monopoly*, II. c, in *Digest Sup. Ct. 1906*.

INJUNCTION—AGAINST MONOPOLIES—SCOPE OF RELIEF.—4. The Federal District Court, in relieving against a combination in restraint of interstate trade, created contrary to the act of July 2, 1890, by the acquisition by the Union Pacific and Central Pacific lines of a dominant stock interest in the Southern Pacific Company, a competing railway system, should, by its decree, provide against the right to vote such stock while in the ownership or control of the Union Pacific Railroad Company, or any corporation owned by it, or while held for it by any corporation or person, and forbid any transfer or disposition thereof in such wise as to continue its control, and should enjoin the payment of dividends on the stock while so held, except to a receiver appointed by the court to collect and hold such dividends until disposed of by its decree.

For other cases, see *Injunction*, I. g, in *Digest Sup. Ct. 1906*.

APPEAL—REMANDING FOR FURTHER HEARING—DISSOLUTION OF MONOPOLY.—5. Any plan for the disposition of the shares of stock of the Southern Pacific Company, found by the Federal Supreme Court to have been acquired by the Union Pacific Railroad Company, contrary to the act of July 2, 1890, prohibiting combinations in the restraint of interstate trade, must be such as effectively to dissolve the unlawful combination, and must be subject to the approval and decree of the district court, which shall proceed, upon the presentation of any plan, to hear the Government and the defendants, and may bring in any additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views of the Supreme Court.]

For other cases, see *Appeal and Error*, 5406-5406, in *Digest Sup. Ct. 1906*.

* * * * *

The facts, which involve the validity under the Sherman Anti-Trust Act of 1890 of the purchase by the Union Pacific Railroad Company of a dominant interest of the stock of the Southern Pacific Company, and whether the same was a combination in restraint of interstate commerce within the purview of the act, are stated in the opinion.

Mr. Cordenio A. Severance, The Attorney General, Mr. Frank B. Kellogg, for the United States, appellant.

The maintenance of free competition among railways has become the settled policy of the Nation.

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The Interstate Commerce Act, in its provisions against contracts, agreements, or combinations between common carriers for pooling, enforces the competitive principle.

The Sherman Law, as construed by the courts, is directed against all attempts to suppress competition among interstate carriers or to monopolize interstate commerce. *National Cotton Oil Co. v. Texas*, 197 U. S. 115; *Northern Securities Co. v. United States*, 193 U. S. 197; *United States v. Standard Oil Co.*, 173 Fed. Rep. 177; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

This policy has found expression in the constitutions and laws of thirty-seven States and two Territories.

The courts have recognized and enforced the policy, both under statutory and constitutional provisions, and also in the absence of such provisions. *Central R. R. Co.* [65] v. *Collins*, 40 Georgia, 582; *Clarke v. Central R. & B. Co.*, 50 Fed. Rep. 338; *Commonwealth v. South Penn Road*, 1 Pa. Co. Ct. Rep. 214; *Continental Securities Co. v. Interborough R. T. Co.*, 165 Fed. Rep. 945; *Currier v. Ry. Co.*, 48 N. H. 322; *East St. Louis Connecting Ry. v. Jarvis*, 92 Fed. Rep. 735; *East Line and Red River Co. v. Texas*, 75 Texas, 434; *Edwards v. Southern Ry. Co.*, 66 S. Car. 277; *Gulf, Col. & S. Fe R. R. Co. v. Texas*, 72 Texas, 404; *Hamilton v. Savannah, &c., Ry.*, 49 Fed. Rep. 412; *Langdon v. Branch*, 37 Fed. Rep. 449; *Louisville & Nash. R. R. Co. v. Kentucky*, 97 Kentucky, 675; S. C., 161 U. S. 677; *Morrill v. Railway Co.*, 55 N. H. 531; *Pearsall v. Great Northern Ry.*, 161 U. S. 646; *Penn. R. R. Co. v. Commonwealth*, 7 Atl. Rep. 368, 374; *State v. Vanderbilt*, 37 Oh. St. 590; *Stockton v. Central R. R. of N. J.*, 50 N. J. Eq. 52; *Tex. & Pac. Ry. Co. v. So. Pac. Ry.*, 41 La. Ann. 970; *Yazoo, &c., Ry. Co. v. Southern Ry. Co.*, 83 Mississippi, 746.

It is immaterial that one of two competing roads may be organized under the laws of another State or situated beyond the borders of the State having the prohibition. *Currier v. Ry. Co.*, 48 N. H. 322; *Investigation into Union Pacific and Southern Pacific*, 12 I. C. C. Rep. 347; *Morrill v. Railway Co.*, 55 N. H. 531; *Union Pacific v. Mason City & Ft.*

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Dodge Ry. Co., 199 U. S. 160; *United States v. Union Pacific R. R. Co.*, 188 Fed. Rep. 121.

Prior to the acquisition of the stock of the Southern Pacific Company by the Union Pacific the lines of those two systems were competitive, and such acquisition, having eliminated such competition, was therefore in restraint of trade and in violation of the Anti-Trust Act. *East St. Louis Connecting Ry. v. Jarvis*, 92 Fed. Rep. 735; *East Line and Red River Co. v. Texas*, 75 Texas, 434; *East Line and Red River Co. v. Rushing*, 69 Texas, 306; *Gulf, Col. & S. Fe R. R. Co. v. Texas*, 72 Texas, 404; *Harriman v. Northern Securities Co.*, 197 U. S. 244; *Kimball v. A., T. & S. F. Ry. Co.*, 46 Fed. Rep. 888; *Louis. & Nash. R. R. [66] Co. v. Kentucky*, 97 Kentucky, 675; *S. C.*, 161 U. S. 677; *Northern Securities Co. v. United States*, 193 U. S. 197; *Pearsall v. Great Northern Ry.*, 161 U. S. 646; *Penna. R. R. Co. v. Commonwealth*, 7 Atl. Rep. 368, 374; *Standard Oil Co. v. United States*, 221 U. S. 1; *State v. Montana Ry. Co.*, 21 Montana, 221; *State v. Vanderbilt*, 37 Oh. St. 590; *Stockton v. Central R. R. of N. J.*, 50 N. J. Eq. 52; *Tex. & Pac. Ry. Co. v. Southern Pacific Ry.*, 41 La. Ann. 970; *United States v. Am. Tobacco Co.*, 221 U. S. 106; *United States v. Joint Traffic Assn.*, 171 U. S. 505; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 302; *United States v. Trans-Missouri Freight Assn.*, 58 Fed. Rep. 64; *United States v. Union Pac. R. R. Co. et al.*, 188 Fed. Rep. 110.

The clause in the Pacific Railroad Act authorizing the Central Pacific and the Union Pacific to consolidate their lines gave the Union Pacific no right to buy the Southern Pacific. *Louis. & Nash. R. R. Co. v. Kentucky*, 161 U. S. 677; *Pearsall v. Great Northern Ry.*, 161 U. S. 646; *Un. Pac. v. Mason City & Ft. Dodge Ry. Co.*, 199 U. S. 160.

The acquisition of the controlling interest in the Southern Pacific system by the Union Pacific tended to suppress competition, and therefore was in restraint of trade; also tended to monopoly and is in violation of the Sherman Act. *Harriman v. Northern Securities Co.*, 197 U. S. 244; *Northern Securities Co. v. United States*, 193 U. S. 197; *Penna. R. R. Co. v. Commonwealth*, 7 Atl. Rep. 368, 374; *Stockton*

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v. Central R. R. of N. J., 50 N. J. Eq. 52; *United States v. Am. Tobacco Co.*, 221 U. S. 106.

The ownership by the Union Pacific of less than a majority of the stock in the Southern Pacific, Santa Fe, Northern Pacific, Great Northern, and San Pedro lines tended to suppress competition and create a monopoly and is inhibited by the Sherman Act. *Central R. R. Co. v. Collins*, 40 Georgia, 582; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 408; *Loewe v. Lawlor*, 208 U. S. 274; *Louis. & Nash. R. R. Co. v. Kentucky*, 161 U. S. 677; *Northern [67] Securities Co. v. United States*, 193 U. S. 197; *Pearsall v. Great Northern Ry.*, 161 U. S. 646; *Penna. R. R. Co. v. Commonwealth*, 7 Atl. Rep. 368, 374; *People v. Chicago Gas Trust Co.*, 130 Illinois, 268; *Salt Co. v. Guthrie*, 35 Oh. St. 666; *Stockton v. Central R. R. of N. J.*, 50 N. J. Eq. 52; *United States v. Standard Oil Co.*, 173 Fed. Rep. 179; *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

The fact that the Union Pacific has, since the commencement of this suit, sold the balance of its stock in the Great Northern and Northern Pacific and in the Santa Fe is no reason why an injunction should not be granted. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

The control of the San Pedro road under the circumstances of this case tended to suppress competition and is void, although that line was not completed at the time of the acquisition of the stock therein. *Commonwealth v. Beech Creek R. R. Co.*, 1 Pa. Co. Ct. Rep. 223; *Farrington v. Stucky*, 165 Fed. Rep. 325; *Hamilton v. Savannah, Florida & W. Ry.*, 49 Fed. Rep. 412; *Hartford & New Haven R. R. Co. v. N. Y. & New Haven R. R. Co.*, 3 Robertson (N. Y. Superior Court), 411; *Inter. Com. Comm. v. Phila. & Reading R. R. Co.*, 123 Fed. Rep. 969; *Langdon v. Branch*, 37 Fed. Rep. 449; *Penna. R. R. Co. v. Commonwealth*, 7 Atl. Rep. 368, 374; *State v. Hartford & New Haven R. R. Co.*, 29 Connecticut, 538; *Thomsen v. Union Castle Mail Steamship Co.*, 166 Fed. Rep. 251; *United States v. Patterson*, 59 Fed. Rep. 280; *United States v. Standard Oil Co.*, 173 Fed. Rep. 177; *Standard Oil Co. v. United States*, 221 U. S. 1.

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The combination of steamship lines between American and foreign ports for the purpose of suppressing competition is within the inhibitions of the Sherman Act. *Thomson v. Union Castle Mail S. S. Co.*, 166 Fed. Rep. 251.

The Government's brief contains a synopsis of the [68] constitutional and statutory provisions of the several States and Territories on the subject of parallel and competing lines.

Mr. N. H. Loomis and Mr. P. P. Dunne for appellees.

The object which the Union Pacific had in view in acquiring an interest in the Southern Pacific, was not to suppress competition or to obtain a monopoly, but to secure a permanent relationship with the Southern Pacific which would insure for it a perpetual through line to San Francisco, as contemplated by Congress, and give to it as well, an entrance into all the traffic-producing centers of California.

As to the conception which Congress and the public had, of a single, indivisible line of railroad extending from the Missouri River, with continuous rails to the Pacific Ocean, see act of July 1, 1862. Not only did Congress provide for the permanent physical continuity of the proposed railroads, but gave power to any two or more of them to consolidate and thus place themselves under a single management. §§ 10, 12, 16, act of July 1, 1862, 12 Stat. 497; § 16, act of July 2, 1864, 13 Stat. 362. See *Ames v. Kansas*, 111 U. S. 449.

The hope and expectation of a single, indivisible line of railroad from the Missouri River to the Pacific Ocean could not be fully realized as long as the ownership was vested in separate corporations and the operation in different managements.

It is clear from the testimony that the officials of the Union Pacific regarded the Southern Pacific not as a competitive, but as a connecting line.

The testimony of the witnesses and the surrounding circumstances demonstrate that the object and intent of purchasing the stock of the Southern Pacific was to protect the integrity of the through line from the Missouri River to the Pacific coast and to procure for the Union [69] Pa-

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cific a permanent entrance into interior California points; it was not to obtain a competing line or to stifle competition.

This intent was shown by betterments. As to deducing intent from actions of the parties, see *United States v. American Tobacco Company*, 221 U. S. 106.

The Southern Pacific was not bound to agree to joint tariffs under any law in force when the stock purchase was made.

There was no law in 1901 by which that company could be forced to grant other than local rates between Ogden and San Francisco on traffic tendered to it by the Union Pacific; nor did the Pacific Railroad Act of July 2, 1864, which required the Union Pacific and the Central Pacific, as well as the other roads included therein, to be operated and used for all purposes of communication and travel so far as the public and Government are concerned as one continuous line extend to requiring joint tariffs. *L. R. & C. R. R. Co. v. E. T. Va. & G.*, 2 I. C. C. Rep. 456, and 3 I. C. C. Rep. 1, 6.

This court has held that the fixing of rates is a legislative power which can not be exercised by the courts *The Express Cases*, 117 U. S. 1, 28; *Central Stock Yards v. Louisville & C. Ry. Co.*, 192 U. S. 568, 571; *Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. Co.*, 51 Fed. Rep. 465, 474; *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. Rep. 775.

The want of power to compel railroads to enter into such agreements led to the adoption of the Hepburn Act, § 15, 34 Stat. 590, and the Interstate Commerce Commission was authorized to establish through routes, fix rates, and to determine the division of the through rate between connecting carriers; but as to the law prior thereto, see *Southern Pacific v. Int. Com. Comm.*, 200 U. S. 536, 553; *Chicago & N. W. Ry. v. Osborne*, 52 Fed. Rep. 915.

The want of legal power on the part of the Union [70] Pacific to compel the Southern Pacific to recognize the usual incidents of a through route and the discretion possessed by the Southern Pacific to do as its own welfare might dictate with respect to through rates, gave to that company addi-

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tional advantages and made it possible for the Southern Pacific to more effectively control the situation.

The so-called Portland route to San Francisco is not a practicable one. Union Pacific officials had frequently considered the opening of the Portland gateway for San Francisco traffic, but had always concluded that it would be an unprofitable move, and therefore it was not done. One serious objection was the length of the line. Portland is substantially the same distance from Omaha as San Francisco is, and the rate to San Francisco through Portland would have to be the same as the rate via the short, direct line through Ogden; and the rate to Portland was the same as the rate to San Francisco. The Union Pacific would receive no greater revenue for hauling freight through Portland to San Francisco than it would for the same freight delivered at Portland.

As a matter of fact, the Portland route to San Francisco has never been used, although it has been open, physically, since 1884.

The most conclusive point, showing that the Portland route to San Francisco is and always has been an impracticable one, is the fact that the Northern rail lines terminating at Seattle, Tacoma, and Portland have never been able to carry any substantial amount of trans-continental traffic to or from San Francisco.

The Government's argument is that the Portland route to San Francisco could have been used by the Union Pacific, in view of the successful operation of the Sunset line between New York and San Francisco via New Orleans by the Southern Pacific. The conditions surrounding the operation of the Sunset route are so dissimilar, however, that it can not be regarded as a parallel case. In the first place it is operated under a single management from New York to San Francisco and California business is given preferred attention. The freight is carried by boat from New York to New Orleans without stop; the California freight quickly transferred to cars waiting upon the wharves, and transported in trainload lots to Los Angeles and San Francisco. It is a service which can not be duplicated by any other broken water and rail line.

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The traffic upon which complainant mainly relies to establish competitive relations between the Union Pacific and the Southern Pacific in 1901, was traffic between the Atlantic seaboard and the Middle West on the one hand and California points on the other. As to all this traffic the Union Pacific and Southern Pacific were not competitors, but connections, and, in a sense, partners.

A railroad is not a competitor of its connections on business handled by them jointly under a through tariff. *Southern Pacific v. Interstate Commerce Commission*, 200 U. S. 536.

In the *Standard Oil case*, 221 U. S. 1, 80, this court recognized the legality of combining various pipe lines, in order to make a continuous line, and declared that an agreement or combination so to do would not be repugnant to the Sherman Act.

Some of the reasons why Union Pacific was not a competitor of Southern Pacific's Sunset route are that it was a connection of the Southern Pacific, handling through business on a joint tariff, to which the Southern Pacific had voluntarily agreed. In entering upon this relationship and agreeing to the joint tariff, the Union Pacific knew that the Southern Pacific possessed another line via New Orleans and that it would endeavor to route traffic that way and get the long haul whenever circumstances permitted it. But notwithstanding that fact the Union [72] Pacific was willing to continue the relationship. As a matter of fact it had no choice about the matter; it was compelled to submit to these conditions. The Southern Pacific was not only a partner but a dominant partner—a partner with which the Union Pacific was required to associate or go out of business. With no rails of its own into California and no other railroad but the Southern Pacific to handle its California traffic, it was impossible for it to occupy the position of an independent, hostile competitor.

The same principle is also controlling when we consider that as between the Union Pacific and the Southern Pacific, San Francisco is a local non-competitive point on the Southern Pacific, situated eight hundred miles distant from the western terminus of the Union Pacific.

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In the next place, the Government's argument assumes that two parts of the same railroad can compete with each other; that is to say, that that portion of the Southern Pacific Railroad extending from San Francisco to Ogden can compete with that portion thereof extending from San Francisco to New York.

This assumption can not be correct, as it is obvious that a railroad company can not compete with itself.

Furthermore, the Union Pacific was a constituent member of the Ogden route before the purchase, and it continued as such thereafter. If the Ogden route, including the Union Pacific, competed with the Sunset route before the purchase, it still competes with it; if it did not compete with it before the purchase, it does not compete with it now. Competitive conditions between the two routes have not been changed by placing the Union Pacific and the Southern Pacific under a common management.

As the Southern Pacific controlled the routing of California business, and the Union Pacific could obtain the business through the friendly interposition of that company only, it can not be maintained that the Union Pacific [73] was a competitor of the company it was dependent upon to get the business.

If the Southern Pacific was a competitor of the Union Pacific on California business, because of the Sunset route, and the Union Pacific can not own the stock of the Southern Pacific, then it will be impossible for any of the large railroads of the country to extend their lines by purchase or consolidation. Every railroad with more than one gateway is in the same predicament. If the Government were devising a scheme to prevent the consolidation of all railroads, regardless of whether they were parallel or connecting lines, a better one could not have been concocted than the theory adopted in this case.

Another reason why the Union Pacific should not be considered as a competitor of the Southern Pacific on trans-continental business to and from California points is that it is but one link in the all-rail through line from the Atlantic seaboard to San Francisco, while the Southern Pacific has a continuous line from New York to San Francisco,

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under a single management. The Union Pacific is dependent not only on the Southern Pacific on the west, but on its eastern connections as well, to fix a through rate or to maintain a through service; in itself it could do nothing without the voluntary co-operation of the lines extending east from Omaha or Kansas City.

If one line is the competitor of another merely because both of them happen to be links in systems of through routes which compete with each other, practically every railroad in the United States is a competitor of every other railroad in the United States, and under those conditions not one line could purchase or consolidate with another line because of its being a competitor.

Complainant's testimony as to the existence of separate soliciting agencies and of the consolidation of certain of those agencies subsequent to 1901 does not prove that the [74] Southern Pacific and Union Pacific were in competition with each other.

All the large railroad systems in the United States have several gateways, representing different routes, through which their traffic may be handled; for instance, the New York Central, Pennsylvania, and Baltimore & Ohio railroads have among others, their St. Louis and Chicago gateways; the Chicago, Milwaukee & St. Paul, its Omaha, Kansas City, and St. Paul gateways; the Missouri Pacific, its Pueblo and El Paso gateways; the Southern Railway, its Memphis and New Orleans gateways; the Louisville & Nashville, its St. Louis, Memphis, and New Orleans gateways.

It is the effort of soliciting agents to secure business through these different gateways, as varying circumstances require them to solicit in favor of the one or the other, which induces the belief that there is competition between the routes represented by them, even though the agents may be working in the interests of the same carrier. A brief consideration of the proposition will disclose its fallacy.

Complainant's witnesses who expressed the opinion that the Union Pacific and Southern Pacific were competing upon California business did so entirely upon the assumption that the rivalry of soliciting agents was the competition

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of railroads. The testimony shows, however, how fallacious such testimony is and demonstrates that the strife for business may merely be the competition which is constantly going on between agents in the service of the same principal.

As the work of soliciting agents against each other may be in pursuance of a common employment and the results of their labors for the benefit of the same railroad or combination of connecting railroads, testimony as to the rivalry of soliciting agents cannot be used to show the existence of competition between the routes which they represent.

[75] The fact that two railroads have separate soliciting agents does not necessarily prove that the railroads they represent are competitors.

The Government itself asserts that the Union Pacific and Southern Pacific are not competing at the present time and yet it appears that there are separate soliciting agencies representing those companies at New York and San Francisco and other points.

The other alleged competitive routes of minor importance did not make the Union Pacific and the Southern Pacific competitors in any direct and substantial sense.

In order to bring the competition within the inhibition of the Sherman Act, it must be direct and substantial. Competition which is indirect and remote is not competition within the meaning of the statute; traffic unsubstantial in amount is not included within the terms of the law. When the Government seeks to set aside transactions as in restraint of trade and commerce, the burden rests upon it not only to prove the restraint of commerce, but the restraint of a substantial volume of commerce. It must affirmatively show that the competition was of some practical importance and that the restraint of commerce involved was unreasonable.

The Sherman Act was not intended to apply to combinations whose effect upon interstate commerce was indirect or incidental only, or which might remotely affect that commerce. *United States v. Joint Traffic Assn.*, 171 U. S. 505, 568.

This court puts contracts which only indirectly and incidentally restrain interstate commerce upon the same basis

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which there are numerous examples, which incidentally and with respect to validity as legislation of the States, of indirectly affect interstate commerce and yet are valid because it is not a direct regulation of such commerce. *Anderson v. United States*, 171 U. S. 604, 615, and [76] *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 229.

This court held in one of the most important and far-reaching decisions ever announced by it, that the Sherman Act does not prohibit every contract, combination, etc., in restraint of trade, but only those which unreasonably restrain trade and commerce. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. Am. Tobacco Co.*, 221 U. S. 106; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179; *Phillips v. Cement Co.*, 125 Fed. Rep. 594; *Kimball v. Atchison & Co. Ry. Co.*, 48 Fed. Rep. 888; *State v. Cent. of Ga. Ry.*, 109 Georgia, 716.

Treating all of the traffic over the various routes of minor importance as competitive and considering it in the aggregate, it is a mere bagatelle when compared with the entire traffic of the Union Pacific and the Southern Pacific. It amounts to only 0.88 per cent of the tonnage of the Southern Pacific and to only 3.10 per cent of the tonnage of the Union Pacific, while the revenue of the Southern Pacific from this traffic aggregates only 1.25 per cent of its total revenue, an amount which it is not conceivable that the Union Pacific would have cared to invest millions in Southern Pacific stock to suppress. See *Rogers v. Nashville & Co. Ry. Co.*, 91 Fed. Rep. 299, and cases *supra*.

The purchase of the stock of the Northern Pacific and the Santa Fe by defendants, and the settlement of right-of-way controversies with the Clark interests, which resulted in the joint construction and ownership of the San Pedro road, were not acts performed with the object of suppressing competition or of acquiring a monopoly, nor did they have that effect.

A review of the entire record demonstrates that a monopoly has not been created, that there has been no suppression of competition, and that there was no conspiracy to effectuate either purpose. The record shows, on the [77] other hand, that the interest which the Union Pacific

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acquired in the Southern Pacific has been of direct and substantial benefit to trade and commerce.

The Union Pacific ownership of Southern Pacific stock was not a control, and did not import, as a matter of law, the power in any view of the case to restrict competition. The Union Pacific merely became a minority stockholder, having by its first purchase acquired only about 37½ per cent of the stock and never acquired a majority. While the Union Pacific may have been able to keep control with less than a majority of stock there was always a possibility that it could not do so. Stock control condemned by this court has been of an actual majority. *Pearsall v. Great Northern Ry.*, 161 U. S. 671; *Northern Securities Case*, 120 Fed. Rep. 726; *S. C.*, 193 U. S. 106; Noyes on Inter-corporate Relations, § 294; and see *Pullman Co. v. Mo. Pac. R. R.*, 115 U. S. 578.

The acquisition and ownership by the Union Pacific of the Huntington stock by out-and-out sale to it by a stockholder in the market, is not, as such, within the power of Congress to regulate, under the commerce clause of the Constitution. *United States v. Knight Co.*, 156 U. S. 1.

The acquisition and ownership of property by a corporation or citizen of a State is not interstate commerce. The Union Pacific is a Utah corporation and had power to purchase stock of the Southern Pacific. *Nat. Bank v. Matthews*, 98 U. S. 628; *St. Louis R. R. v. Terre Haute R. R.*, 145 U. S. 407; *Paul v. Virginia*, 8 Wall. 168.

A State corporation is subject to regulation by Congress only to the extent and by the measure of its engagement in interstate commerce. *Employers' Liability cases*, 207 U. S. 463, 499. See *Ashley v. Ryan*, 153 U. S. 436, 442; *Louisville & Nashville case*, 161 U. S. 677; *Mobile & C. R. R. Co. v. Mississippi*, 210 U. S. 187, 202.

The authority of the several States to permit railroads within their respective territory to consolidate on terms [78] prescribed by each is inconsistent with the assertion of a power of Congress to the same effect, as it could only prescribe a uniform rule.

The purchase by the Union Pacific of the Huntington stock by out-and-out sale is not within the purview of the

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Sherman Law. An out-and-out sale is quite distinguishable from a collateral stipulation or covenant running with the sale.

The combination or conspiracy prohibited by the Sherman Law is essentially a process terminable in future. It is not like a sale completed when made. *Mitchell v. Reynolds*, 1 P. Wms. 181. For some of these collateral agreements to sales see *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Nordenfeldt v. Maxim*, App. Cas., 1904, 535; *Bancroft v. Embossing Co.*, 72 N. H. 407; *Packet Co. v. Bay*, 200 U. S. 179.

Something more than the acquisition of a competing property is necessary to bring the purchaser and seller within the Sherman Law. *Shawnee Compress Co. case*, 209 U. S. 434; *Chemical Co. v. Provident Co.*, 64 Fed. Rep. 950; *The Greene case*, 52 Fed. Rep. 115; *Roller Co. v. Cushman*, 143 Massachusetts, 355, 364; *Oakdale Co. v. Garst*, 28 Atl. Rep. 973. See also *Harriman v. Menzies*, 115 California, 19; *Collins v. Locke*, L. R., 4 App. Cas. 674; *Skrainka v. Scharring-Hausen*, 8 Mo. App. 522; *Leslie v. Lorillard*, 110 N. Y. 519; *Cohen v. Berlin*, 56 N. Y. Supp. 558; *Kellog v. Larkin*, 3 Pinney (Wis.), 123; *Dolph v. Troy Co.*, 28 Fed. Rep. 554; *Mathews v. Associated Press*, 32 N. E. Rep. 981; *Vinegar Co. v. Voehrbach*, 148 N. Y. 58; *Macauley v. Tierney*, 19 R. I. 255; *Bohn v. Mfg. Co.*, 54 Minnesota, 233; *Cote v. Murphy*, 159 Pa. St. 420; *Ins. Co. v. Bd. of Underwriters*, 67 Fed. Rep. 317; *Nat'l Assn. v. Cumming*, 170 N. Y. 315; *Vogelen v. Ganter*, 167 Massachusetts, 92, opinion of Holmes, J.

A competitor may be driven out by lawful competition, *Mogul S. S. Co. v. McGregor*, L. R., 23 Q. B. D. 612; [79] *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 459; *Bonsack v. Smith*, 70 Fed. Rep. 388, and if so he may also lawfully be bought out by voluntary contract.

More size or aggregation by purchase does not necessarily amount to violations of the Sherman Law.

The same stockholders may lawfully own a controlling interest in each of two competing corporations. *Bigelow v. Calumet Co.*, 167 Fed. Rep. 704, 727.

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Mr. Justice DAY delivered the opinion of the court.

The case was begun in the United States Circuit Court for the District of Utah to enforce the provisions of the so-called Sherman Anti-Trust Act of 1890, 26 Stat. 209, c. 647, against certain alleged conspiracies and combinations in restraint of interstate commerce. The case in its principal aspect grew out of the purchase by the Union Pacific Railroad Company in the month of February, 1901, of certain shares of the capital stock of the Southern Pacific Company from the devisees under the will of the late Collis P. Huntington, who had formerly owned the stock. Other shares of Southern Pacific stock were acquired at the same time, the holding of the Union Pacific amounting to 750,000 shares or about 37½ per cent (subsequently increased to 46 per cent) of the outstanding stock of the Southern Pacific Company. The stock is held for the Union Pacific Company by one of its proprietary companies, the Oregon Short Line Railroad Company. The Government contends that the domination over and control of the Southern Pacific Company given to the Union Pacific Company by this purchase of stock brings the transaction within the terms of the Anti-Trust Act. A large amount of testimony was taken and the case heard before four circuit judges of the Eighth Circuit, resulting in a decree dismissing the bill. 188 Fed. Rep. 102.

Prior to the stock purchase in 1901 the Union Pacific [80] system may briefly be described as a line of railroad from the Missouri River to the Pacific coast, namely, from Omaha, Nebraska, or perhaps more strictly from Council Bluffs, Iowa, and from Kansas City, Missouri, to Ogden, Utah, and Portland, Oregon, with various branches and connections, and a line of steamships from Portland to San Francisco, California, and from Portland to the Orient; and a line of steamships from San Francisco to the Orient (the Occidental & Oriental Steamship Company), in which the Union Pacific and the Southern Pacific each owned a half interest. The main line from Council Bluffs to Ogden, a little over 1,000 miles in length, with the branch from Kansas City, through Denver, Colorado, to Cheyenne, Wyoming, on the main line, was owned and operated by the

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Union Pacific; the line from Granger, Wyoming, on the main line of the Union Pacific, to Huntington, Oregon, was owned and operated by the Oregon Short Line Railroad Company, the capital stock of which was owned by the Union Pacific; and the line from Huntington to Portland was owned and operated by the Oregon Railroad & Navigation Company, the stock ownership of which was in the Oregon Short Line. The boat line from Portland to San Francisco and to the Orient, the Portland & Asiatic Steamship Company, was organized early in 1901, its stock being owned by the Oregon Railroad & Navigation Company.

The Southern Pacific Company, a holding company of the State of Kentucky, also engaged in operating certain lines of railroad under lease, controlled a line of railroad extending from New Orleans through Louisiana, Texas, New Mexico, Arizona, California and Oregon to Portland, reaching Los Angeles and San Francisco, with several branch lines and connections extending into tributary territory. A line of boats running between New York and New Orleans was also owned and operated by the Southern Pacific, and later the same ships entered the port of Galveston, where also the Southern Pacific reached tidewater, and it had branches extending to various points in northern Texas connecting with other lines of road. The Southern Pacific also operated, under lease, the railroad of the Central Pacific Railway Company, all the stock of which is owned by the Southern Pacific. The lines of the Central Pacific consisted of the road from San Francisco to Ogden, about 800 miles in length and connecting at the latter place with the Union Pacific and the Denver & Rio Grande Railroad Company's line. It also had various branches in and about California aggregating in mileage about 500 miles. The Southern Pacific also owned a majority of the stock of the Pacific Mail Steamship Company, which operated a line of steamships plying to ports in the Orient and running between San Francisco and Panama which, with the Panama Railroad and its boats, constituted the so-called Panama route.

The contention of the Government is that, prior to the stock purchase, the Union Pacific and Southern Pacific were

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competing systems of railroad engaged in interstate commerce, and acted independently as to a large amount of such carrying trade, and that since the acquisition of the stock in question the dominating power of the Union Pacific has eliminated competition between these two systems, and that such domination makes the combination one in restraint of trade within the meaning of the first section of the act of Congress of July 2, 1890, and the transaction an attempt to monopolize interstate trade within the provisions of the second section of the act.

In view of the recent consideration of the history and meaning of the act (*Standard Oil and Tobacco cases*, 221 U. S. 1 and 106, respectively) it would be superfluous to enter upon any general consideration of its origin and scope. In certain aspects the law has been thoroughly considered and its construction authoritatively settled, and in determining the present controversy we need but [82] briefly restate some of the conclusions reached. The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505. The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof. *United States v. Joint Traffic Association, supra*. In that case an agreement between competing interstate railroads for the purpose of fixing and maintaining rates was condemned.

"It is," said the court (p. 571), "the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

In the *Northern Securities Co. v. United States*, 198 U. S. 197, this court dealt with a combination differing in character from that considered in the *Trans-Missouri* and *Joint*

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Traffic cases, and it was there held that the transfer to a holding company of the stock of two competing interstate railroads, thereby effectually destroying the power which had theretofore existed to compete in interstate commerce, was a restraint upon such commerce, and Mr. Justice Harlan, announcing the affirmance of the Decree of the Circuit Court, said (p. 337):

"In all the prior cases in this court the Anti-Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in [88] other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

Mr. Justice Brewer, who delivered a concurring opinion, while expressing the view that the former cases were rightly decided, said that they went too far in giving the reasons for the judgments, and declared his view that Congress only intended to reach and destroy those contracts which were in direct restraint of trade, unreasonable and against public policy. He was nevertheless emphatic in condemning the combination effected by the Northern Securities Company and the transfer of stocks to it, which policy, he declared, might be extended until a single corporation with stocks owned by three or four parties would be in practical control of both roads, or, viewing the possibilities of combination, the control of the whole transportation system of the country, and, in concluding his concurring opinion, said (p. 363):

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I can not look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with State law and within the letter and spirit of the statute and the power of Congress."

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Of the Sherman Act and kindred statutes, this court, speaking by Mr. Justice McKenna, said in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129:

[84] "According to them, competition, not combination, should be the law of trade. If there is evil in this, it is accepted as less than that which may result from the unification of interest, and the power such unification gives. And that legislatures may so ordain this court has decided. *United States v. E. C. Knight Co.*, 156 U. S. 1; *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *United States v. Joint Traffic Association*, 171 U. S. 505; *Northern Securities Co. v. United States*, 193 U. S. 197; *Swift & Co. v. United States*, 196 U. S. 375."

In the recent discussion of the history and meaning of the act in the Standard Oil and Tobacco cases this court declared that the statute should be given a reasonable construction, with a view to reaching those undue restraints of interstate trade which are intended to be prohibited and punished, and in those cases it is clearly stated that the decisions in the former cases had been made upon an application of that rule, and there was no suggestion that they had not been correctly decided. In the Tobacco case, after referring to the previous decision in the Standard Oil case and the decisions in the Trans-Missouri and Joint Traffic cases, the doctrine was tersely summarized by the Chief Justice, speaking for the court, as follows (p. 179):

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain [85] the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words

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restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.”

We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable. *Swift & Co. v. United States*, 196 U. S. 375.

Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the Northern Securities case, the controlling interest in the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This court has repeatedly [86] held this general phraseology embraces all forms of combination, old and new. “In view of the many new forms of contracts and combinations,” said the Chief Justice in the Standard Oil case (p. 59), “which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.” A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other, could hardly be conceived. If it is true, as contended by the Government, that a stock interest sufficient for the purpose was obtained in the Southern Pacific Company, with a view to securing the control of that company

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and thus destroying or restricting competition with the Union Pacific in interstate trade, the transaction was in our opinion within the terms of the statute.

That the purchase was legal in the State where made and within corporate powers conferred by State authority constitutes no defense, if it contravenes the provisions of the Anti-Trust Act, enacted by Congress in the exercise of supreme authority over interstate commerce. *Northern Securities Co. v. United States*, *supra*, 334; *Standard Oil Co. v. United States*, *supra*, 68; *United States v. American Tobacco Co.*, *supra*, 183.

It is said, however, and this was the view of the majority of the circuit judges, that these railroads were not competing, but were engaged in a partnership in interstate carriage as connecting railroads, and it was further said that the Southern Pacific, because of its control of the line from Ogden to San Francisco and other California points, was the dominating partner. A large amount of the testimony in this voluminous record was given by railroad men of wide experience, business men and shippers, who, with [87] practical unanimity, expressed the view that prior to the stock purchase in question the Union Pacific and Southern Pacific systems were in competition, sharp, well-defined, and vigorous, for interstate trade. To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific, through its agents, advertisements, and literature, had undertaken to obtain transportation for its "Sunset" or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement, fixed at the

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same figure whichever route was used and then apportioned among the connecting carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service, and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment.

[88] The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. *United States v. Joint Traffic Association*, *supra*, 577. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *Pearsall v. Great Northern Railway Co.*, 161 U. S. 646, 676; *United States v. Joint Traffic Association*, *supra*.

It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony

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amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business was a comparatively small part of the sum total of all traffic, State and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a [89] negligible part, but a large and valuable part, of interstate commerce which was thus directly affected.

The fact that the Southern Pacific had a road of its own from the Gulf to the Pacific coast did not prevent competition for this traffic. The Union Pacific and its connections were engaged in the same carrying trade, and as a matter of fact were competing for that trade, by all the usual means of competition resorted to by rival railroad systems. As this court said, speaking by Mr. Justice Holmes, in *Swift & Co. v. United States*, *supra*, 398: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." That commerce, as conducted from the East to the Pacific coast, was in a substantial part the subject matter of rivalry and competition between these two systems. Since the stock transfer the companies have common officers and the rival soliciting agencies have been for the most part abandoned.

It is contended that the Union Pacific was but a connecting road and really had no line to San Francisco, but was dependent upon the Southern Pacific for such terms as it could make over the old Central Pacific line from Ogden to San Francisco. The facts disclose, as we have already said, that the Union Pacific had a line to Portland by way of the Oregon Short Line and the Oregon Railroad & Navigation Company, and thence to San Francisco by steamboat connection. It may be admitted that this was a much longer route than by way of the Ogden connection, and that as a practical matter nearly all of the freight intended for San Francisco and near-by points went over the

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Ogden route, nevertheless the Portland route was a factor in rate making to the coast, and the testimony shows that the Union Pacific and the Southern Pacific, up to the time of the sale of the stock, had been working for many years under a satisfactory arrangement as to rates. It is going too far to say that the Union Pacific was entirely at the [90] mercy of the Southern Pacific in making rates for freight by way of the Ogden connection because the latter company controlled the old Central Pacific line to San Francisco. It certainly would have been very detrimental to the Southern Pacific to have declined an arrangement for the carriage of freight received from the Union Pacific and its connections for transportation to California by way of the Ogden route. The traffic manager of the Southern Pacific testified that the division of the through rate from Omaha to San Francisco has been the same since 1870; that he thought it unfair to the Southern Pacific, but that it was the best that could be obtained at the time. One of the reasons for the Central Pacific leasing its lines to the Southern Pacific, as set forth in the lease, was that the Union Pacific had secured control of the Oregon Short Line and thereby obtained an outlet to the Pacific, other than over the Central Pacific, "and thus in that respect placed itself in opposition to the interests of the Central Pacific," and that it was "not only to the best interests of, but absolutely necessary that, the Central Pacific Railroad Company, in order to maintain itself against these diversions (of the Union Pacific and others), should be operated in connection with a friendly through line to the waters of the Atlantic."

Nor do we think it can be justly said that because of the connection with the Rio Grande road at Ogden the Southern Pacific was in position to discriminate at will against the Union Pacific in such wise as to greatly impair the latter road's carrying trade upon eastbound freight. In this connection it is said that since the consolidation, notwithstanding the former published rates are maintained, the favoring attitude of the Southern Pacific to the Union Pacific practically destroyed the carrying trade from Ogden to the East for the Rio Grande system and necessitated the

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construction by the latter road of a new connection for California points, and that [91] such would have been the fate of the Union Pacific upon disagreement as to rates with the Southern Pacific. In reference to this point we think it is pertinent to consider the acts of Congress known as the Pacific Railroad Acts. These acts required the two roads, the Central Pacific and Union Pacific, to be "operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one connected, continuous line" (12 Stat. 489, 495, act of July 1, 1862, c. 120, §12), and in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others * * * (13 Stat. 356, 362, act of July 2, 1864, c. 216, § 15). They also authorized the consolidation of the roads. These acts, it is said, are only intended to secure the permanent physical connection of the roads and to provide for equal accommodations upon the basis of independent carriage, and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the Interstate Commerce Acts. Therefore, it is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable treatment which might have been accorded to it in the matter of through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast so far as physical continuity is concerned is apparent, but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time, and transportation shall be without any discrimination of any kind in favor of either of said companies or adverse to the road or business of any or either of the others, and the purpose of Congress [92] to secure a continuous line of road, operating from the Missouri River to the Pacific coast as one road, is further emphasized in the act of Congress of June 20, 1874, c. 331, 18 Stat. 111, making it an offense for

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any officer or agent of the companies authorized to construct the roads or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel and transportation, so far as the public and Government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time and transportation, without any discrimination of any kind in favor of or adverse to any or either of said companies. Such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific and be equally violative of the letter and spirit of the acts of Congress. Certainly such discriminations could be restrained by the courts (*Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564, 603, 604), and might possibly have resulted in a forfeiture of all rights under the acts of Congress. The obligation to keep faith with the Government continued, as did the legislative power of Congress concerning these roads, notwithstanding changed forms of ownership and organization. *Union Pacific Railroad Company v. Mason City &c. Railroad Co.*, 199 U. S. 160.

It is further contended that the real purpose in acquiring the stock was not to obtain the control of the Southern Pacific as a system, but to secure the California connection via Ogden and to avoid the situation which has been termed the "bottling up" of the Union Pacific at that point. That process, we have undertaken to show, might have been detrimental to the Southern Pacific business [98] in California, as it is apparent that much of it would not have gone over the "Sunset" route of the Southern Pacific. It may be conceded, as is undoubtedly the fact, that the connection at Ogden was a valuable one, the one practically and largely, if not exclusively, used in the transportation of freight to and from the State of California, but this case is not to be decided upon the theory that only so much of the Southern Pacific system as operates between Ogden and San

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San Francisco has been acquired. Conceding for this purpose that it might have been legitimate, had it been practicable, to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done, and that was the purchase of the controlling interest in the entire Southern Pacific system, consisting of ocean and river lines with a mileage of about 3,500 miles and railroad lines aggregating over 8,000 miles, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific coast points, with various branches and connections, besides a steamship line from San Francisco to Panama and from San Francisco to the Orient and a half interest in another line between the two latter points. The purchase may be judged by what it in fact accomplished, and the natural and probable consequences of that which was done. Because it would have been lawful to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road.

In determining the validity of this combination we have a right to look also to the intent and purpose of those who conducted the transactions from which it arose and to the objects had in view. *Swift & Co. v. United States*, *supra*, 396; *United States v. St. Louis Terminal*, 224 U. S. 383, 395. It appears that at the time the Union Pacific was [94] about to raise the means to effect the Southern Pacific stock purchase it authorized the issuance of \$100,000,000 of bonds "for the purpose of meeting present and future financial requirements of the company," provision being made for the use of the proceeds from \$40,000,000 of this amount in the purchase of the Southern Pacific stock, with no designation whatever as to the purpose to which the balance, \$60,000,000, should be applied. It is said that the remaining \$60,000,000 were intended to be used in the acquisition of a part interest in the railroad system of the Chicago, Burlington & Quincy Railway Company, in view of the imminent probability of the purchase of that system by the Northern Pacific Railway Company and the

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Great Northern Railway Company. As a matter of fact, the Northern Pacific and Great Northern having each secured a half interest in the Burlington, the Union Pacific did acquire a large amount of the Northern Pacific stock with this \$60,000,000. The failure to secure control of the Northern Pacific by acquiring a majority of its common stock resulted in the formation of the Northern Securities Company, terminating in the litigation of the Northern Securities case and the judgment of this court reported in 193 U. S. 197. When that combination was declared illegal the Union Pacific interests undertook to compel a return of the Northern Pacific stock which they had turned over to the Northern Securities Company and opposed a distribution among the stockholders of the latter company of the stock of the Northern Pacific Company and the Great Northern Company which had been put into the combination. That attempt was dealt with in *Harriman v. Northern Securities Company*, 197 U. S. 244, and of the effect of the return of the Northern Pacific stock to the Union Pacific interests instead of the distribution of the stock and assets of the Northern Securities Company among its stockholders this court said (p. 297):

[95] "It is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock and a ratable distribution of the remaining assets to the other Securities stockholders would not only be in itself inequitable, but would directly contravene the object of the Sherman Law and the purposes of the Government suit.

"The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition."

In view of the testimony we think the evident purpose of issuing the \$100,000,000 of bonds was to acquire a fund to be used for the acquisition of the stock of the Southern Pacific, a great competitive system, and also of the stocks of other competing roads.

After acquiring the Southern Pacific stock, Mr. Harriman, who dominated in the affairs of the Union Pacific, became president and chairman of the executive commit-

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tee of the Southern Pacific Company, with the same ample power which he had in like positions in the Union Pacific Company and the companies owned and controlled by it. These facts cannot be lost sight of in determining the object and scope of the transaction in question, which resulted, as we have said, in that unified control which has in its power the suppression of competition.

But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent, which was afterward somewhat increased and diminished until about 46 per cent of the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is [96] ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46 per cent is ample to control the operations of the corporation. This is frankly admitted in the testimony of Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific Company, and, he added, the Union Pacific did thus acquire such interest.

Reaching the conclusion that the Union Pacific thus obtained the control of a competing railroad system and thereby effected a combination in restraint of trade within the meaning of the Sherman Act, the question remains, What should be the relief in such circumstances? The remedies provided in the statute, generally speaking, were said by this court in the Standard Oil case, *supra*, to be two-fold in character (p. 78):

"1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2nd. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

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In applying this general rule of relief we must deal with each case as we find it, and in the present one the object to be attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the District Court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation owned by it, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as [97] to continue its control, and shall provide an injunction against the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the District Court to collect and hold such dividends until disposed of by the decree of the court.

As the court below dismissed the Government's bill, it was unnecessary there to consider the disposition of the shares of stock acquired by the Union Pacific Company, which acquisition, we hold, constituted an unlawful combination in violation of the Anti-Trust Act. In order to effectually conclude the operating force of the combination such disposition shall be made subject to the approval and decree of the District Court, and any plan for the disposition of this stock must be such as to effectually dissolve the unlawful combination thus created. The court shall proceed, upon the presentation of any plan, to hear the Government and defendants, and may bring in any additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views herein expressed.

As to the suggestion made at the oral argument by the Attorney General, in response to a query from the court as to the nature of the decree, that one might be entered which, while destroying the unlawful combination in so far as the Union Pacific secured control of the competing line of road extending from New Orleans and Galveston to San Francisco and Portland, would permit the Union Pacific to retain the Central Pacific connection from Ogden to San Francisco and thereby to control that line to the coast, thus

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effecting such a continuity of the Union Pacific and Central Pacific from the Missouri River to San Francisco as was contemplated by the acts of Congress under which they were constructed, it should be said that nothing herein shall be considered as preventing the Government or any party in interest, if so desiring, from presenting to the District Court a plan for accomplishing [98] this result, or as preventing it from adopting and giving effect to any such plan so presented.

Any plan or plans shall be presented to the District Court within three months from the receipt of the mandate of this court, failing which, or, upon the rejection by the court of plans submitted within such time, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve such unlawful combination.

The Government has appealed from the decree which is a general one dismissing the bill. So far as concerns the attempt to acquire the Northern Pacific stock and the stock of the Atchison, Topeka & Santa Fe Railway Company, afterwards abandoned, and a certain interest in the San Pedro, Los Angeles & Salt Lake Railroad Company, and other features of the case which were dealt with and disposed of by the decree and opinion of the court below, it is sufficient, without going into these matters in detail, to say that as to them we find no reason to disturb the action of the court below, but for the reasons stated the decree should be reversed and one entered in conformity to the views herein expressed, so far as concerns the acquisition of the Southern Pacific stock.

Reversed in part, the District Court to retain its jurisdiction to see that the decree above outlined is made effectual.

Mr. Justice VAN DEVANTER took no part in the hearing or determination of this case.

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UNITED STATES *v.* UNION PACIFIC RAILROAD COMPANY.*

MOTION AS TO FORM OF MANDATE.

No. 446. Submitted December 19, 1912.—Decided January 6, 1913.

[226 U. S. 470.]

Each case under the Sherman Act must stand upon its own facts and this court will not regard the methods provided in decrees of other cases as precedents necessarily to be followed where a different situation is presented for consideration.^b

The ultimate determination of the affairs of a corporation rests with its stockholders and arises from their power to choose the governing board of directors; and this court will not approve a method of distributing stock of a railroad company held by a competitor so that the natural result will be that a majority of the governing boards of both roads shall consist of the same persons.

In this case it is not impossible under the plan proposed that this result will happen and therefore it is not approved.

The main purpose of the Sherman Anti-Trust Act is to forbid combinations and conspiracies in undue restraint of interstate trade and to end them by as effectual means as the court may provide.

A court of equity dealing with an illegal combination should conserve the property interests involved, but never in such wise as to sacrifice the purpose of the statute.

Without precluding the District Court from considering all plans submitted as provided by the former opinion and the decree (*ante*, p. 61) this court now holds that a transfer of the stock of the Southern Pacific Company to the stockholders of the Union Pacific Railroad Company would not so effectually end the combination as to comply with the decree.

[57 L. Ed. 306.]

[**APPEAL—JUDGMENT—COMPLIANCE WITH DECREE—DISSOLUTION OF MONOPOLY.**—The unlawful combination found by the Federal Supreme Court to exist as the result of the acquisition by the Union

* For prior opinions (188 Fed. 102), see *ante*, page 303; (226 U. S. 61), see *ante*, page 652.

^b Syllabus copyrighted, 1912, 1913, by The Banks Law Publishing Company.

^c The paragraph following, in brackets, is the syllabus of the case as reported in volume 57, page 306, Lawyers Edition, Supreme Court Reports. Copyrighted 1912, 1913, by The Lawyers' Co-operative Publishing Company.

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Pacific Railroad Company, through a subsidiary corporation, of 46 per cent of the capital stock of the Southern Pacific Company, for the purpose of obtaining the dominating control of the entire Southern Pacific system, will not be so effectually ended as to comply with the court's decree by a sale of such shares to the shareholders of the Union Pacific Railroad Company substantially in proportion to their respective holdings, or by a distribution thereof by dividend to such shareholders.

For other cases, see Appeal and Error, IX, 1; IX, 1, in Digest Sup. Ct. 1908.]

The facts, which involve the method of effectually dissolving a combination found to be illegal under the Sherman Anti-Trust Act, are stated in the opinion.

The Attorney General for the United States.

Mr. John C. Spooner, Mr. John G. Milburn, Mr. Maxwell Evarts and Mr. N. H. Loomis for appellees, Union Pacific Railroad Company and Oregon Short Line Railroad Company.

[471] Mr. Justice DAY delivered the opinion of the court.

On December 2, 1912, this court handed down an opinion and remanded this case to the District Court of the United States, whence it came, with instructions to enter a decree which would provide an injunction as to voting the stock of the Southern Pacific Company acquired by the Union Pacific Railroad Company, and directed the court to further hear the parties in order to make a decree effectually concluding the operating force of the combination created by the purchase of the Southern Pacific Company's stock. The parties were given three months from the receipt of the mandate of this court by the District Court to propose plans, and it was directed that any one adopted by the court should be such as would effectually dissolve the unlawful combination.

The mandate of this court not having issued, on December 19, 1912, a motion was made in which the Attorney General of the United States and counsel for the appellees the Union Pacific Railroad Company and the Oregon Short Line Rail-

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road Company (the latter holding the stock for the Union Pacific Company) joined in asking this court, "to instruct the United States District Court for the District of Utah, by a provision incorporated in the mandate of this court, when issued, or otherwise, whether or not a sale of the Southern Pacific Company shares held by said appellees to the shareholders of appellee Union Pacific Railroad Company, substantially in proportion to their respective holdings, or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend, would, in the opinion of this court, constitute a disposition of said shares in compliance with the opinion herein filed on December 2, 1912."

In pursuance of the request thus preferred by the United States and the appellees named, it becomes necessary now to determine whether the distribution or sale proposed of the Southern Pacific Company's shares will comply with the decree ordered to be entered by the former opinion of this court.

The Southern Pacific Company's stock, held by the Oregon Short Line Company for the Union Pacific Company, amounts to \$126,650,000, par value, in shares of \$100 each, and constitutes 46 per cent of the Southern Pacific Company's stock, enough, as we have heretofore found, to effectually control the Southern Pacific Company. As stated by the appellees, the Union Pacific Company has outstanding \$99,569,300, par value, of preferred stock and \$216,646,300, par value, of common stock, all in shares of \$100 each, amounting in all to \$316,215,600, and also has outstanding \$37,000,000 of bonds convertible into stock, and the appellees further state that its stock is distributed among over 22,000 holders.

It is contended on behalf of the appellees that the distribution of the Southern Pacific Company's stock, held, as we have stated, by the Oregon Short Line Company for the Union Pacific Company, among so many stockholders will effectually conclude the combination decreed to be ended by the former order of the court. It is insisted that such distribution will prevent the continued operation of the combination for the control of the Southern Pacific Company by

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a competing company, which the Union Pacific Company was found to be, and that it is authorized under the practice in respect to such decrees as settled by the previous decisions of this court in affirming the decree of the Circuit Court in *Northern Securities Co. v. United States*, 193 U. S. 197, and *Harriman v. Northern Securities Co.*, 197 U. S. 244, and the decree of the Circuit Court in *Standard Oil Co. v. United States*, 221 U. S. 1.

In the Northern Securities Company case, after providing for orders of injunction to prevent the continued operation of the Northern Securities Company, which [478] controlled the Northern Pacific Railway Company and the Great Northern Railway Company, it was provided (p. 355):

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Upon the affirmation of this decree by this court in 193 U. S. 197, the Northern Securities Company proceeded to reduce its outstanding capital stock from \$395,400,000 to \$3,954,000, providing for such reduction by requiring each holder to surrender to the company for retirement 99 per cent of the shares held by him, and upon surrender by a stockholder the company assigned and transferred to him proportionate amounts of the stock of the Northern Pacific Company and Great Northern Company which had been placed with the Northern Securities Company, the holding company, for the purpose of creating the combination, which the court had held to be illegal, and this plan of distribution was approved by this court in 197 U. S. 244. In other words, the stock of the holding company was reduced and

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the surplus of assets created by such reduction, the stock of the Northern Pacific Company and the Great Northern Company was distributed among the stockholders of the Northern Securities Company, thereby effectually ending the combination.

In the Standard Oil Company case the majority of the stock of nineteen oil companies had been placed in the control of a holding company, the Standard Oil Company of New Jersey, with a capital stock of \$100,000,000, the stock of the latter corporation being issued to the holders of the stock in the nineteen companies in exchange for their stock. This holding company was held to be a combination and conspiracy in restraint of trade and commerce, and, after awarding injunctions, it was provided:

"But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination."

It is evident in that case, as in the Northern Securities Company case, that the distribution of the shares and stocks of the subsidiary companies, parties to the combination, among the shareholders of the Standard Oil Company of New Jersey, was to end the combination which had been decreed to be in violation of law, and prevent the continued control of the subsidiary companies by the holding company.

As was said in the opinion filed in this case, however, each case under the Sherman Act must stand upon its own facts, and we are unable to regard the decrees in the Northern Securities Company case and the Standard Oil Company case as precedents to be followed now, in view of the different situation presented for consideration.

The Southern Pacific Company's stock was mainly purchased from private parties, legatees of the Huntington estate, and it is evident that it is impossible to restore the *status quo* by the return of such stock to the persons from whom it was purchased upon such vendors refunding the purchase money.

[475] The plan proposed in the present motion of distributing the stock among the shareholders of the Union

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Pacific Company or of selling it to such shareholders will in effect transfer the stock from the Oregon Short Line Company, which now holds it for the Union Pacific Company, to the stockholders of the latter company, who own and control that company. Upon the face of it, this would seem to be a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company, because of the power given to the Union Pacific Company's stockholders to choose the directors of the Southern Pacific Company. The ultimate determination of the affairs of a corporation rests with its stockholders and arises from their power to choose the governing board of directors. Unless otherwise provided by law, the stockholders may authorize the board of directors to delegate to an executive committee the authority to do any and all acts which the directors are authorized to do. The executive committee thus derives its authority from the stockholders through the board of directors. *Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co.*, 163 U. S. 564, 597. In the present case the record discloses this mode of management of both the Southern Pacific Company and the Union Pacific Company, and, since 1905, as the proof shows, a majority of both executive committees consisted of the same persons and Mr. Harriman was chairman of both committees.

It is contended for the appellees, however, that, in view of the great number of widely scattered stockholders of the Union Pacific Company, there is no probability of their acting together to continue the control of the Union Pacific Company over the Southern Pacific Company. Indeed, this is said to be impossible. But we are unable to accede to this contention. Bearing in mind the object of the statute to end such combinations and the duty of [476] the courts in dealing with them to make such decrees as will most thoroughly effectuate that purpose, it is not consistent with that end to order such distribution of the stock as may fail to discontinue the control denounced, and as in all probability will fail to efficiently enforce the statute. It is by no means improbable, but quite likely, that, if the stock was transferred to the stockholders of the Union Pacific

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Company by distribution among them, the large stockholders could, by purchases and transfers of the stock, get into their own hands the power of choosing directors of both companies, and thus, though in a different manner, the Southern Pacific Company would continue to be in the practical control of the Union Pacific Company, which has been found to be a rival and competing company within the meaning of the law. So of the privilege of sale to the stockholders in proportion to the amount of their holdings.

In considering these questions we must bear in mind not only the number of stockholders, but the character of the distribution of the stock among them. In the brief and exhibits of the appellees filed with this motion it is shown that of the 22,150 stockholders of the Union Pacific Company, 68, owning 5,000 or more shares each, hold together \$189,782,700 of the stock and 800 others, owning from 1,000 to 5,000 shares each, hold together \$59,020,700 of the stock, and that the two groups (comprising 368 stockholders) hold \$198,803,400, or 62.8 per cent, of the stock, while the remaining stockholders (21,782) control only \$117,412,200 of the stock. Many small shareholders might not wish to purchase the Southern Pacific Company's stock, and the privilege might be readily acquired from them by the larger and more active interests vested in the hands of the large stockholders, and thus again the condition forbidden be created and perpetuated.

The main purpose of the act is to forbid combinations and conspiracies in undue restraint of trade or tending to [477] monopolize it, and the object of proceedings of this character is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies. So far as is consistent with this purpose a court of equity dealing with such combinations should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed and no form of dissolution be permitted that in substance or effect amounts to restoring the combination which it was the purpose of the decree to terminate.

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In rejecting the plan for the transfer of the Southern Pacific Company's stock held for the Union Pacific Company, either by distribution or sale to the stockholders of the Union Pacific Company, we do not mean to preclude the District Court from considering and acting upon plans which may be submitted to it under the former opinion and decree of the court. We are of opinion, however, and now hold that the proposed plan of disposition of the entire stock holding of the Union Pacific Company in the Southern Pacific Company by transfer to the stockholders of the Union Pacific Company will not so effectually end the combination as to comply with the decree heretofore ordered by this court to be entered.

So ordered.

Mr. Justice VAN DEVANTER took no part in the hearing or determination of this motion.

UNITED STATES v. READING COMPANY.**TEMPLE IRON COMPANY v. UNITED STATES.****READING COMPANY v. UNITED STATES.***

**APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF PENNSYLVANIA.**

Nos. 198, 206, 217. Argued October 10, 11, 1911.—Decided December 16, 1912.

[226 U. S. 324.]

The United States filed a bill to enforce the provisions of the Sherman Anti-Trust Act of July 2, 1890, against an alleged combination of railroad and coal mining companies formed to restrain competition in the production, sale, and transportation in interstate commerce of anthracite coal. The bill alleged a general combination through an agreement between the carrier defendants to apportion

* For opinion of the Circuit Court (183 Fed. 427), see volume 3, page 866.

For opinion of the Supreme Court modifying mandate (227 U. S. 158), see *post*, page 739.

For opinion of the District Court in later case (226 Fed. 229) see volume 6, page 290.

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the coal tonnage between themselves on a scale of percentages; a combination through the medium of one of the mining companies to prevent the construction of a new competing coal carrying road from the anthracite district to tidewater; a combination by a series of identical contracts with independent coal operators for sale of their total product; and certain contributory combinations between some but not all of the defendants. The bill was filed prior to the enactment [§25] of the Commodities Clause of the Hepburn Act of June 20, 1906. *Held* that: *

Any relief against a continuance of the transportation of carrier owned coal under the Commodities Clause must be sought in a proceeding based upon that act and can not be obtained in this suit.

On the record in this case, this court agrees with the court below that the Government has failed to show any contract or combination for the distribution of coal tonnage between themselves.

The defendants did combine to unreasonably restrain interstate commerce in violation of the Sherman Anti-Trust Act through the Temple Iron Company to prevent the construction of the competing coal-carrying railroad.

Although a combination has succeeded in accomplishing one of the purposes for which it was formed, if it is still an efficient agency to prevent competition in other methods, the court may proceed to judgment and decree its dissolution.

A disclaimer on the part of defendants of power of any one of them to control business of the others cannot detract from the significance of documentary evidence bearing on the relations of the defendants to each other.

Although separate acts of the defendants may be legal under the State law when considered alone, they may, when taken together, become parts of an illegal combination under the Anti-Trust Act which it is the duty of the court to dissolve.

Acts absolutely lawful may be steps in a criminal plot. *Aikens v. Wisconsin*, 195 U. S. 206.

While no one of a number of contracts considered severally may be in restraint of trade, each of a series of innocent contracts may be a step in a concerted criminal plot to restrain interstate trade, and if so, may thereupon become unlawful under the Anti-Trust Act. *Swift & Co. v. United States*, 196 U. S. 375.

In this case *held* that a series of identical contracts between interstate carriers with a great majority of the independent coal operators to market all the coal of the latter for all time at an agreed percentage of tidewater price were all parts of a concerted scheme to control the sale of the independent output and were unreason-

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able contracts in restraint of interstate trade within the prohibition of the Sherman Act.

Where, as in this case, purchase and delivery within a State is but one step in a plan and purpose to control and dominate trade and commerce in other States for an illegal purpose, it is an interference with and restraint of interstate commerce. *Loewe v. Lawler*, 208 U. S. 274.

While the Sherman Act does not forbid or restrain the power to make [§26] usual and normal contracts to further trade through normal methods, whether by agreement or otherwise, *Standard Oil Co. v. United States*, 221 U. S. 1, it does forbid contracts entered into according to a concerted scheme, as in this case, to unduly suppress competition and restrain freedom of commerce among the States.

While the law may not compel competition, it may remove illegal barriers resulting from illegal agreements, such as those involved in this case, which make competition impracticable.

Whether a particular act or agreement is reasonable and normal or unreasonable may in doubtful cases turn upon intent, and the extent of control obtained over the output of a commodity may afford evidence of the intent to suppress competition.

Where there is no doubt that the necessary result of an act is to materially restrain trade between the States, intent is of no consequence.

In a suit to restrain all defendants from carrying out an illegal combination under the Sherman Act in which all defendants participated, the court will not consider minor combinations between less than all of the defendants which did not constitute part of the general combination found to be illegal. To do so would condemn the bill for misjoinder and multifariousness.

In this case the court expresses no opinion on such minor combinations and as to them the bill should be dismissed without prejudice. 183 Fed. Rep. 427, affirmed in part and reversed in part.

[57 L. Ed. 243.*]

[MONOPOLY—COMBINATION BY CARRIERS—DEFEATING PROJECTED LINE.—1. Carriers possessing a substantial monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and tidewater distributing points, and also controlling, with the aid of their subsidiary coal mining and selling companies, nearly three-fourths of the annual supply of anthracite, must be deemed to have combined to restrain interstate trade, contrary to the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), where, with the purpose and result of defeating

*The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 57, page 243, *Lawyers' Edition*, Supreme Court Reports. Syllabus copyrighted, 1912, 1913, by The Lawyers' Co-operative Publishing Company.

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the construction of a projected independent competing railway line, and thus preserving their existing monopoly of transportation, they purchased, through another corporation whose capital stock they first acquired, the coal properties and collieries controlled by certain independent coal operators who were the chief supporters of the projected railway enterprise, although the acquisition of such property, considered alone, may have been lawful under the local law.

For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.

MONOPOLY—COMBINATION BY CARRIERS—LEGALITY OF PARTICULAR ACTS.—2. Parts of a general scheme of railway carriers to combine to restrain the freedom of interstate commerce, either in the transportation or sale of anthracite, contrary to the act of July 2, 1890, however lawful when considered alone, *e. g.*, the acquisition of the stock of another corporation, and the purchase by it of the capital stock of certain coal properties and collieries, are parts of an illegal combination under the statute, which it is the duty of the courts to dissolve, irrespective of how the legal title to the shares is held.

For other cases, see Monopoly, II. c, in Digest Sup. Ct. 1908.

MONOPOLY—COMBINATION BY CARRIERS—PERCENTAGE COAL CONTRACTS.—3. An undue and unreasonable restraint of interstate commerce, forbidden by the act of July 2, 1890, results from the concerted scheme of railway carriers possessing a substantial monopoly of the transportation facilities between the anthracite deposits in Pennsylvania and tidewater distributing points, and also controlling, with the aid of their subsidiary coal mining and selling companies, nearly three-fourths of the annual supply of anthracite, whereby a large number of the independent coal operators were induced to enter singly into uniform perpetual agreements for the sale to some one of such carriers, or its subsidiary coal company, of the entire output of their several mines and any others they might thereafter acquire, at a fixed percentage of the general average price prevailing at tidewater points at or near New York, which would net the operator slightly more than if he shipped and sold on his own account, the necessary result being to secure to the carriers the control at tidewater markets of the sale of a large part of the independent output.

For other cases, see Monopoly, II. c. in Digest Sup. Ct. 1908.

RELIEF UNDER PLEADING—INJUNCTION AGAINST MONOPOLY—MULTIFARIOUSNESS.—4. Infunctive relief against minor combinations between some only of the defendants, and not in furtherance of the general scheme attacked as constituting a restraint of interstate commerce forbidden by the act of July 2, 1890, can not be granted without condemning the bill for multifariousness and misjoinder of parties and of causes of suit.

For other cases, see Injunction, I. g; Pleading, I. l, I. t, in Digest Sup. Ct. 1908.]

Argument for the United States.

The facts, which involve the legality under the Sherman Anti-Trust Act of certain combinations of railroad and coal-mining companies engaged in the production, sale and transportation in interstate commerce of anthracite coal, are stated in the opinion.

Mr. J. C. McReynolds, with whom *The Attorney General* and *Mr. G. Carroll Todd* were on the brief, for the United States.

The interests of defendant railroads in the shares of coal owning and producing companies and in anthracite coal lands acquired since January 1, 1874, are held in violation of the constitution of Pennsylvania.

Constitution of Pennsylvania, adopted November 3, 1873, effective January 1, 1874, Art. XVII, § 5; *Int. Com.* [327] *Comm. v. Phila. & Reading Ry. Co.*, 123 Fed. Rep. 969; *Lehigh Valley R. Co. v. Rainey*, 112 Fed. Rep. 487; *Stockton v. Central R. R. of N. J.*, 50 N. J. Eq. 52; *Farmers' Loan & Trust Co. v. New York & Co. R. Co.*, 150 N. Y. 410, 430; *York & Co. R. Co. v. Winans*, 17 How. 31, 40. *Commodities Clause case*, 213 U. S. 366, is not in conflict with the view that a railroad owning substantially the entire capital stock of a coal-mining company is "directly or indirectly" engaged in mining within the meaning of the Pennsylvania constitution.

Where a coal company is run as a department of the railroad, the latter has an "interest, direct or indirect," in the mining, even within the restricted sense of those words in the commodities clause. *United States v. Lehigh Valley R. Co.*, 220 U. S. 257.

Conceding that prior to January 1, 1874, the Legislature of Pennsylvania had authorized railroads, either in their own names or indirectly through holding the stock of and controlling coal-mining companies, to engage in mining coal for transportation over their own lines, it was yet within the power of the people of that State to provide in their new constitution, all existing laws and charters to the contrary notwithstanding, that no railroad not then

Argument for the United States.

so engaged in mining coal should thereafter be permitted to do so; that the authority once granted, whether by general or special law, in so far as it remained unexecuted, was then and there repealed. *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646; *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677.

All rights and privileges granted to corporations in Pennsylvania since 1857 were taken expressly subject to revocation, excepting in so far as they might become executed. Pennsylvania constitution of 1790, as amended in 1857, Art. I, § 26; 1 Brightly's Purdon's Dig. Pa. L., 10th ed., p. 24; *Pennsylvania Railroad v. Duncan*, 111 Pa. St. 352, 361; *Hays v. Commonwealth*, 82 Pa. St. 518.

[228] As to the limitation upon the right to alter or revoke expressed in the clause, "in such manner, however, that no injustice shall be done to the corporators," see *Bienville Water Co. v. Mobile*, 186 U. S. 212, 222.

It makes no difference whether the shares of a mining company are purchased at a judicial sale rather than a private sale, since the constitution makes no distinction between the two modes. *Louisville & Nashville R. Co. v. Kentucky*, 161 U. S. 677, 692.

It could not obtain by transfer from its predecessor the latter's right (if any it had) to hold the stock of coal mining companies in Pennsylvania if the constitution or laws of Pennsylvania then prohibited such stockholding by a railroad. *Atlantic & G. Ry. Co. v. Georgia*, 98 U. S. 359; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465; *Keokuk & C. R. Co. v. Missouri*, 152 U. S. 801, 808-810; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171; *Yazoo & M. V. R. Co. v. Adams*, 180 U. S. 1, 18-21; *Yazoo & M. V. R. Co. v. Vicksburg*, 209 U. S. 358, 362.

It is enough that the railroad acquired the shares after January 1, 1874.

No corporation can receive, by transfer from another, an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the constitution or laws of the State then applicable; and this is true, even though, under legislative authority, the exemption is trans-

Argument for Appellees.

ferred by words which clearly include it. *Rochester R. Co. v. Rochester*, 205 U. S. 236, 254; *Yasoo & M. V. R. Co. v. Vicksburg*, 209 U. S. 358; *Great Northern Ry. Co. v. Minnesota*, 216 U. S. 206.

Commonwealth v. New York, L. E. & W. R. Co., 132 Pa. St. 591, distinguished.

Where a railroad lawfully engaged prior to January 1, 1874, in mining coal, either in its own name or through a subsidiary company, has since that date, in its own name or through a subsidiary company, acquired and mined [329] additional coal lands and so become further engaged in mining, such lands are held in violation of the Pennsylvania constitution.

Railroads engaged, as defendants are, in transporting coals of the same kind from a sole and restricted area of production to the principal market, are competitive, although their tracks may not reach the same mines.

Whether railroads are competitive is a question of mixed law and fact. *State v. Vanderbilt*, 37 Oh. St. 590; *United States v. Union Pacific R. Co.*, 188 Fed. Rep. 102, 113; *Kimball v. Atchison & Co. R. R.*, 46 Fed. Rep. 888, 890.

Mr. John G. Johnson and Mr. Adelbert Moot, with whom *Mr. Charles Heebner, Mr. Frank H. Platt, Mr. Robert W. De Forest, Mr. Jackson E. Reynolds, Mr. George F. Brownell*, and *Mr. William S. Jenney* were on the brief, for certain railroad corporations, appellants in No. 217 and appellees in No. 198.

The general charge of the petition, that since 1896 the original defendant railroad companies and coal companies have combined and conspired to stifle competition in and monopolize trade and commerce among the States in anthracite coal, was not sustained by the Government, and that charge was properly dismissed by the unanimous decision of the circuit judges.

The testimony offered by the Government, relating to the board of control agreement of 1876, the meetings of certain railroad officers from 1884 to 1887, and the leases in 1892 of the Lehigh Valley and Jersey Central Railroads to the

Argument for Appellees.

Philadelphia & Reading Railroad Company, did not constitute legal evidence of the general conspiracy alleged to have existed from 1896 to 1907, nor of any of the five particular conspiracies alleged to have been entered into in furtherance of such general conspiracy.

The claim of the Government that about 1896 an agreement was entered into for a division of the coal tonnage—[330] the so-called "Presidents' Percentages"—and that such percentage agreement was continuously maintained thereafter, was not sustained by the evidence.

The acquisition in 1898 by the Erie Railroad Company of the capital stock of the New York, Susquehanna & Western Railroad Company constituted no evidence that the defendant railroad and coal companies were in the alleged general conspiracy to stifle competition in trade and commerce in anthracite coal.

The acquisition in 1899 of the Simpson and Watkins collieries by the Temple Iron Company, in which some of the defendants were interested, constituted no evidence that the defendants were engaged in the alleged general conspiracy.

The acquisition in 1901 by the Erie Railroad Company of the capital stock of the Pennsylvania Coal Company furnished no evidence of the alleged general conspiracy.

The acquisition in 1901 by the Reading Company of a majority of the capital stock of the Central Railroad Company of New Jersey furnished no evidence that the defendants were engaged in the general conspiracy alleged.

It was no proof of the alleged general conspiracy, that certain of the defendant railroads purchased minor interests in the capital stock of the Lehigh Valley Railroad Company, and afterwards sold the same at a profit.

It was no proof of the general conspiracy alleged, that in 1905 the Lehigh Valley Railroad Company purchased the interests of Coxe Brothers & Company in a branch line of railroad and in certain coal mining properties on such branch line.

The acquisition of coal lands from time to time by the defendants constituted no evidence of the general conspiracy alleged.

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There was no evidence of an agreement or conspiracy to establish or to maintain uniform sales prices or uniform transportation rates.

[881] As to the 65 per cent contracts, the only issue presented by the pleadings is whether they were entered into in pursuance of an agreement or conspiracy between the original defendants to restrain interstate commerce.

The history of these contracts should satisfy this court, as it did the majority of the circuit judges, that these contracts did not arise from any desire to terminate a trade war or other competitive conditions, that they were not framed either as the result of any combination or with any object or intent to stifle or obstruct either the production or sale of coal, that they have not had the effect of restricting commerce in coal, and that, on the contrary, they were framed with honest purposes, to establish fair methods of conducting business and that they have resulted in the promotion and increase of commerce.

The 65 per cent contracts are not, in themselves, unlawful and unreasonable restraints of interstate trade and commerce. Those contracts are intrastate, and not interstate contracts; they do not affect interstate commerce, except indirectly and incidentally, and so are not violative of the Anti-Trust Act.

Mr. James H. Torrey for certain coal mining corporations, appellants in No. 217 and appellees in No. 198:

The 65 per cent contracts do not concern directly interstate commerce and are, therefore, not cognizable in this proceeding.

The position taken by the Government requires as prerequisite of a decree for the cancellation of the 65 per cent contracts, the association in purpose or intention of these defendants with the conspiracy or combination in restraint of trade, which it is charged rendered those contracts illegal. No such association is established either by the pleadings or proof.

So far as concerns these defendants, the 65 per cent contracts are perfectly honest, straightforward, and legitimate sales [882] of coal, untainted by any ulterior or illegal purpose or design.

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As to both contracting parties, sellers and buyers, the 65 per cent contracts are bona fide transactions for the sale of the product of the particular collieries involved, untainted by any ulterior or illegal purpose or design.

Mr. James H. Torrey and *Mr. William S. Opdyke* filed a brief for appellee, the Delaware & Hudson Company:

The Delaware & Hudson Company has never been a party to any combination for the establishment of a monopoly or for the restraint of interstate commerce, in respect of the production, sale, or transportation of anthracite coal.

The contracts made by the Delaware & Hudson Company with the Hillside Coal & Iron Company for the sale of anthracite coal in limited amounts and in limited periods to the Hillside Coal & Iron Company violated no law of the United States.

These contracts for the sale of coal in the State of Pennsylvania, and all deliveries under such contracts were made in the State of Pennsylvania. They were therefore purely intrastate contracts, both made and performed within the State of Pennsylvania. They did not directly relate in any way to interstate commerce. *Coe v. Errol*, 116 U. S. 517; *The Daniel Ball*, 10 Wall. 557, 565; *Kidd v. Pearson*, 128 U. S. 1, 24; *United States v. Knight*, 156 U. S. 1, 13; *Hopkins v. United States*, 171 U. S. 578, 592, 593, 598, 603; *Anderson v. United States*, 171 U. S. 604; *Addyston Pipe Case*, 175 U. S. 211, 247; *Field v. Barber Asphalt Co.*, 194 U. S. 618, 623; *Bigelow v. Calumet & Hecla Co.*, 167 Fed. Rep. 721.

The United States is not entitled to ask for the entry of any decree, by way of injunction or otherwise, against the Delaware & Hudson Company.

The present proceeding is under a statute of a penal [238] character requiring the strictest proof. *Northern Securities case*, 193 U. S. 197, 401.

The absolute freedom of this defendant to make contracts for a sale of a portion, or even of all, its production of anthracite coal to anyone or in any form it sees fit, is one which

Argument for Appellees.

can not be taken away from it by any statute of a State or of the United States.

In the absence of any proof that such sale was upon the part of the Delaware & Hudson Company a portion of an illegal combination to which it was itself intentionally a party, the company is entitled to enforce such contract against the other party thereto, and that right can not be taken away from it without its consent, no question of police power being involved. *Tracy v. Talmage*, 14 N. Y. 162, 167; *Ganson v. Tift*, 71 N. Y. 48, 57; *Graves v. Johnson*, 179 Massachusetts, 53; *National Distilling Co. v. Cream City Importing Co.*, 86 Wisconsin, 356; *Metcalf v. American School Furniture Co.*, 122 Fed. Rep. 115, 120; *Carter-Crume Co. v. Peurrung*, 86 Fed. Rep. 439, 442; *Adams v. Coulliard*, 102 Massachusetts, 167; *Connolly v. Sewer Pipe Co.*, 184 U. S. 540.

Mr. William W. Green filed a brief for appellee, the Mercantile Trust Company.

Mr. Adelbert Moot and *Mr. George F. Brownell* filed a brief for the Erie Railroad Company, appellee.

The United States failed to show that the Erie Railroad Company, or the stockholders of the New York, Susquehanna & Western Railroad Company, or the stockholders of the Pennsylvania Coal Company, or any other person or corporation intended "restraint of trade or commerce," or to "monopolize or attempt to monopolize any part of trade or commerce," and therefore the court below unanimously and properly dismissed the petition upon the merits upon the facts.

[334] The defendants' evidence and exhibits affirmatively disprove the charge of either general or special conspiracies to violate either §§ 1 or 2 of the act, and show, instead, that each purchase of stock in question was made by the Erie Railroad Company for proper and lawful business reasons under authority of its charter and the legislation of the States of New York, Pennsylvania, and New Jersey, respectively.

Argument for Appellees.

The full constitutional and exclusive power of the National Government by executive officers, legislative acts, and judicial decrees to regulate interstate commerce is admitted. This does not make the purchase of those stocks interstate commerce or illegal under the Sherman Anti-Trust Act, because: The New York, Susquehanna & Western Railroad Company was never a parallel and competing line of the Erie Railroad Company, nor was it in such financial or physical position to compete at the mines or elsewhere as to enable the Erie Railroad Company to cause restraint or monopoly of interstate trade contrary to such statute.

The Erie Railroad Company, the Pennsylvania Coal Company, and its railroad, the Erie & Wyoming Railroad, had been duly authorized to enter into contract and traffic relations with each other. They had done so; such contracts were not prohibited by Federal law, nor are they now, and such contract relations, begun over 40 years before the stock purchase, still existed and would continue until at least January 1, 1911; therefore, the acquisition of the stock of such companies by the Erie Railroad Company, to give it further control over a connecting railway in Pennsylvania that was an old and natural connection and feeder, and of the tonnage it was built to serve, more than forty years before, the stock purchase, for the same purpose was lawful. *Bosman*, 5 R. 1014 R.; *Thomas*, 5 R. 1121-2; *R. R. Co. v. R. R. Co.*, 171 Pa. St. 284; *A. F. & C. R. R. Co. v. Denver & C. R. Co.*, 110 U. S. 667; *Cin. R. R. [835] Co. v. Int. Com. Comm.*, 162 U. S. 184, 197; *L. & N. R. Co. v. West Coast N. S. R. Co.*, 198 U. S. 488; *So. Pac. v. Int. Com. Comm.*, 200 U. S. 536-554.

The petition, as we have heretofore pointed out, does not allege that the Pennsylvania Coal Company stock purchase was a "step" in the general conspiracy charged, as it does in other cases; nor does it allege any vice in the purchase, except that the stock was purchased at an "exorbitant" price, and thereby a proposed railroad wholly in the State of New York lost its most influential backer and was never built.

Argument for Appellant.

No relief was asked for under this petition, which failed to even state a case within the statute. The Government evidence wholly failed to establish an "exorbitant" price; but the contrary was the undisputed fact. No interstate, or parallel, or competing railroad was involved, but only a Pennsylvania connection which had been a feeder of over forty years' standing and its tonnage. There was no intent to violate the law, and it was not violated.

Mr. Everett Warren for Temple Iron Company, appellant in No. 206:

The Temple transactions were not for the purpose of preventing the construction of another interstate carrier of anthracite, even if it is assumed that the independents by securing the charter of the New York, Wyoming & Western contemplated reaching tidewater by the utilization of that proposed road as a means, but were for the purpose of retaining to the carriers the tonnage of the so-called Simpson & Watkins collieries they then enjoyed under lawful contracts, beyond any hazard of a threatened, or supposedly threatened, diversion. In other words, it was a measure of defense, not offense, the purposes and intent of which was to fortify and make sure an already impregnable legal position.

[336] The projected road was an intrastate road and nothing else, and if it is assumed that the contemplated purchase of the Simpson & Watkins collieries defeated its construction, and the proofs show the contrary, the purchase did not have any effect upon interstate trade or commerce.

Simpson & Watkins were not the principal supporters of the projected intrastate road. The road itself was a visionary enterprise, entirely impracticable, and its abandonment was due to other causes than the acquisition by the Temple Iron Company of the Simpson & Watkins collieries.

The charges in the Government's petition, namely, the high price paid for the Simpson & Watkins properties and the little value standing alone of the stock and bonds of the Temple Company, were without foundation of fact to rest upon and were disproven in the Government's own case.

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There never was contemplated any pooling or division of the tonnages moving from the Simpson & Watkins collieries among the railroad stockholders of the Temple Company serving the region where these collieries were situated, much less any pooling and division of such tonnage as a fact.

The history of the management and development of the Temple anthracite operation since February, 1899, as it is undisputed and appears in the Government's own case, discloses a careful business-like conduct of its affairs in line with and following out the plain purpose of its entrance into the anthracite field, namely, to make money out of its mines for its stockholders as independent coal operators. Its transactions are altogether within the State of Pennsylvania and end there.

The Temple transaction had and could have no bearing upon interstate trade or commerce under the actual situation of affairs; are not within the provisions of the Anti-[237] Trust Law, nor indeed within the constitutional authority of Congress.

Mr. Justice LUXTON delivered the opinion of the court:

This is a petition in equity filed by the United States in the Circuit Court of the United States for the Eastern District of Pennsylvania, for the purpose of enforcing the provisions of the act of July 2, 1890, known as the Sherman Anti-Trust Act, against an alleged combination of railroad and coal mining companies formed and continued for the purpose of restraining competition in the production, sale, and transportation of anthracite coal in commerce among the States.

The defendants originally made such, and alone referred to hereafter as the defendants, were the following:

The Philadelphia & Reading Railway Company; the Philadelphia & Reading Coal & Iron Company; the Lehigh Valley Railroad Company; the Lehigh Valley Coal Company; the Delaware, Lackawanna & Western Railroad Company; the Central Railroad Company of New Jersey; the Erie Railroad Company; the New York, Susquehanna &

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Western Railroad Company; the New York, Susquehanna & Western Coal Company; the Lehigh & Wilkes-Barre Coal Company; the Pennsylvania Coal Company; the Hillside Coal Company; the Reading Company; and the Temple Iron Company. By an amendment certain other defendants were brought in, consisting of holders of contracts made by independent operators of coal mines, and trustees holding securities which might be affected by the relief sought against the carrier and coal mining companies, the original defendants. A list of these later defendants is set out in the margin^a and when they are referred to herein they will be specifically mentioned.

[838] The bill alleges that anthracite coal is an article of prime necessity as a fuel and finds its market mainly in the New England and Middle Atlantic States. The deposits of the coal, with unimportant exceptions, lie in the State of Pennsylvania, but do not occupy a continuous field, though found in certain counties adjoining in the eastern half of the State, and embrace an area of 484 square miles. This coal region is from one hundred and fifty to two hundred and fifty miles from tidewater. The region itself is broken and mountainous, and the natural conditions and character of the deposits are such that the mining and re-

^aThe Delaware & Hudson Company; Elk Hill Coal & Iron Company; St. Clair Coal Company; Enterprise Coal Company; Buck Run Coal Company; Llewellyn Mining Company; Clear Spring Coal Company; Pancoast Coal Company; Price-Pancoast Coal Company; Mount Lookout Coal Company; Peoples Coal Company; George F. Lee Coal Company; North End Coal Company; Melville Coal Company; Parrish Coal Company; Red Ash Coal Company; Raub Coal Company; Mid Valley Coal Company; Austin Coal Company; Clarence Coal Company; Nay Aug Coal Company; Green Ridge Coal Company; Excelsior Coal Company; Lackawanna Coal Company; Dolph Coal Company, Limited; Mary F. W. Howe, Frank Pardee, and Sarah Drexel Van Rensselaer, constituting A. Pardee & Co.; Lafayette Lentz, William O. Lentz, and Lewis A. Riley, constituting Lentz & Company; William Law and John M. Robertson, constituting Robertson & Law; Richard White, W. R. McTurk, and Robert White, constituting E. White Company; Joseph J. Jermyn, George B. Jermyn, Emma J. Jermyn, constituting John Jermyn Estate; Joseph J. Jermyn, Michael F. Dolphin; The Pennsylvania Company for Insurance on Lives and Granting Annuities; and the Mercantile Trust Company.

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duction of the coal to suitable sizes for domestic use require very large amounts of capital. Its value commercially is dependent, in a large degree, upon quick and cheap transportation to convenient shipping points at tidewater, from whence it may be distributed to the great consuming markets of the Atlantic Coast States.

The whole problem of advantageously developing these deposits and supplying the eastern demand for fuel was one which presented enormous difficulties. From an early day it has been the settled policy of the State of Penn-
[399] sylvania to encourage the development of this coal region by canal and railroad construction, which would furnish transportation to convenient shipping points at tidewater. One of the defendant carriers, the Delaware, Lackawanna & Western Company, was given the power to acquire coal lands and engage in the business of mining and selling coal in addition to the business of a common carrier, and all railroad companies were permitted to aid in the production of coal by assisting coal mining companies through the purchase of capital stock and bonds. Thus, it has come about that the defendant carriers not only dominate the transportation of coal from this anthracite region to the great distributing ports at New York harbor, but also through their controlled coal-producing companies, produce and sell about seventy-five per cent of the annual supply of anthracite. As a further direct consequence of the State authorized alliance between coal-producing and coal-transporting companies, it has come about that the defendant carrier companies and the coal-mining companies affiliated with the carrier companies now own or control about ninety per cent of the entire unmined area of anthracite, distributed, according to the averments of the petition, as follows:

	Per cent.
Reading Company	44
Lehigh Valley Company	18.87
Del., Lack. & Western Company	6.55
Central Railroad of New Jersey	19
Erie Railroad	2.59
N. Y., Sus. & Western Railroad54
	<hr/> 89.55

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It further appears that in addition to the great coal-mining companies subsidiary to one or another of the defendant carrier companies, there are a large number of independent coal operators whose aggregate production [340] from coal lands, in part leased from the railroad companies or the railroad-controlled coal-producing companies, amounts to about twenty per cent of the annual anthracite supply. These independent operators are said to no longer have the power to compete with the carrier defendants and their subsidiary coal companies, because a large proportion of them have severally entered into contracts with one or the other of the carrier or coal-mining companies defendant for the sale of the entire product of their mines for the consideration of sixty-five per cent of the average market price at tidewater.

Thus, there exists, independently of any agreement, combination or contract between the several defendant carrier companies for the purpose of suppressing competition among them, this condition:

First. Excluding two carrier companies not made defendants which reach but a limited number of collieries, the Pennsylvania Railroad Company and the New York, Ontario & Western Railroad Company, the six carrier companies who are defendants are shown to control the only means of transportation between this great anthracite deposit and tidewater, from whence the product may be distributed by rail and water to the great consuming markets of the Atlantic Coast States.

Second. These carriers and their subsidiary coal mining and selling companies produce and sell about seventy-five per cent of the total annual supply of anthracite coal. Of the remainder, the independent operators mentioned above produce about twenty per cent.

The chief significance of the fact that the six carrier defendants control substantially the only means for the transportation of coal from the mines to distributing points at tidewater is in the fact that they, collectively, also control nearly three-fourths of the annual supply of anthracite which there finds a market. The situation is therefore one

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which invites concerted action and makes exceedingly easy the accomplishment of any purpose to dominate the supply and control the prices at seaboard. The one-fourth of the total annual supply which comes from independent operators in the same region has been sold in competition with the larger supply of the defendants. If, by concert of action, that source of competition be removed, the monopoly which the defendants, acting together, may exert over production and sale will be complete.

This bill avers that the defendants have combined for the purpose of securing their collective grip upon the anthracite coal supply by exerting their activities to shut out from the district any new line of transportation from the mines to tidewater points, and to shut out from competition at tidewater the coal of independent operators with their own coal. The steps said to have been taken having this end in view we shall now consider:

The community of interest which has resulted from the charter powers of the carrier companies to directly or indirectly engage in the business of mining and selling coal has produced the relation between the carrier and coal-mining defendants shown by the several groups into which we have arranged them, thus:

1. The Reading Company is a Pennsylvania corporation, and apparently nothing more than a holding company. That company holds:

a. The entire capital stock of the Philadelphia & Reading Railway, one of the defendant carriers.

b. The entire capital stock of the Philadelphia & Reading Coal & Iron Company, a coal-mining company.

The three companies have the same president.

2. The Lehigh Valley Railroad Company owns all of the capital stock of the Lehigh Valley Coal Company, and the two companies have the same president.

3. The Central Railroad of New Jersey owns ninety per cent of the capital stock of the Lehigh & Wilkes-Barre Coal Company, and the two companies have the same president, who is also the president of the Reading Company and its two controlled companies.

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4. The Erie Railroad Company owns all of the capital stock of the Pennsylvania Coal Company and a large majority of the stock of the Hillside Coal Company, and the three companies have the same president.

5. The New York, Susquehanna & Western Railroad Company owns nearly the entire capital stock of the New York, Susquehanna & Western Coal Company, and they have the same president, who is also the president of the Erie Railroad Company and of its two allied coal companies mentioned above.

6. The Delaware, Lackawanna & Western Railroad Company is itself an owner and producer of anthracite and seems to have no subsidiary coal company.

7. The Temple Iron Company. The relation of this company to the several carrier companies will be considered separately.

Excluding the Temple Iron Company, the groups as arranged are independent of each other, and each group, in the absence of any agreement or combination, possesses the power to compete with every other in the production, sale, and transportation of coal from the mines to tidewater. Indeed, the plain averment of the bill is that prior to 1896 they were actually competing in the market reached at New York Harbor, and that the competition continued, except as interrupted by abortive or abandoned efforts to combine, until they entered into the general combination which it is the purpose of this proceeding to dissolve.

That the Delaware, Lackawanna & Western Railroad Company was itself the owner of coal lands and was engaged in mining, transporting, and marketing its own coal, and that the other railway defendants were also engaged, through their subsidiary coal companies, in mining and [343] selling coal, as well as in transporting the coal so mined, is not determinative of any issue here presented, since this bill was filed before the Commodities Clause of the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591, became effective, which forbids any carrier engaged in interstate transportation from transporting coal for market, when the coal at the time of transportation is owned by the carrier company. See *United States v. D., L. & W. R. Co.*, 213

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U. S. 306. Any relief against a continuance of such forbidden transportation must, therefore, be sought in another proceeding based upon the act of Congress referred to.

THE SCOPE AND THEORY OF THE BILL.

The theory upon which the bill is framed and upon which the case has been presented by counsel is, that there exists between the defendants a *general combination* to control the anthracite coal industry, both in respect of mining and transportation from the mines to the general consuming markets reached from shipping points at New York Harbor, and the production and sale of coal throughout the United States.

The contention is that this *general combination* is established, first, by evidence of an agreement between the carrier defendants to apportion between themselves the total coal tonnage transported from the mines to tidewater according to a scale of percentages; second, by a combination between them, through the instrumentality of the defendant, the Temple Iron Company, to prevent the construction of a new and competing line of railroad from the mines to tidewater; third, by a combination between the defendants by means of a series of identical contracts for the control of the coal produced by independent coal operators, thereby preventing competition in the markets of other States between the coal of such independent operators and that produced by the defendants; and, [344] finally, by certain so-called contributory combinations, already referred to, between some, but not all, of the defendants.

Aside from the particular transactions averred as "steps" or "acts in furtherance" of a presupposed *general combination*, the charge of such a combination is general and indefinite.

The case is barren of documentary evidence of solidarity. The fact of such general combination, if it exists, must be deduced from specific acts or transactions in which the companies have united and from which such a general combination may be inferred. When and how did such a combination come about? We start with the proposition

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that if any such combination exists it had an origin not earlier than 1896. Attempts to bring about a suppression of competition prior to that time, indicated by some of the evidence, had either proved abortive or had been abandoned. Thus it is stated that in 1890 and 1891 the price of coal of certain sizes at tidewater was from \$3.71 to \$3.85 per ton; that in 1892 the Philadelphia & Reading Railroad Company, the predecessor in title of the defendant the Philadelphia & Reading Railway Company, leased the lines of the Lehigh Valley Railroad Company and of the Central Railroad Company of New Jersey for nine hundred and ninety-nine years, and that the three companies together owned or controlled about eighty per cent of the coal deposits of this anthracite region and transported nearly fifty per cent of the entire tonnage; that while these leases were in force the price of coal was advanced to \$4.15 and \$4.19 per ton for the same sizes. It is then averred that in a proceeding in the courts of New Jersey these leases of the Central Railroad Company of New Jersey were held null and void, and that in 1893 this decree was followed by a rescission of the lease of the Lehigh Valley Railroad Company to the Philadelphia & Reading Railroad Company. It is then averred that [345] under the influence of competition thereby restored, the price of the same grade of coal in 1894 fell to \$3.60 per ton and in 1895 to \$3.12 per ton. "*Whereupon*," the petition avers, "in violation of the provisions of sections 1 and 2, respectively; of the act of Congress of July 2, 1890, * * * the defendants, the Reading Company, and the defendant carriers, and the defendant coal companies, owning or controlling 80 per cent, more or less, of all the anthracite deposits, and producing 75 per cent, more or less, of the annual anthracite supply, and controlling all the means of transportation between the anthracite mines and tidewater, save the railroads operated by the Pennsylvania Railroad Company and the New York, Ontario & Western Railway Company, which, as aforesaid, reach only a limited number of collieries (not defendants here), entered into an agreement, scheme, combination, or conspiracy, by virtue

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whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other States and its price and sale throughout the several States, with the result that competition in the transportation and sale of anthracite has been wholly suppressed and the price thereof greatly enhanced."

1. We come first to the evidence relied upon to show such a general combination through an agreement between the carriers to distribute the total tonnage of coal from this region to shipping points at New York Harbor according to a scale of percentages spoken of as the "Presidents' Percentages."

There is some evidence tending to show that early in 1896 there was an effort made at a conference of the presidents of the carrier companies to distribute the coal tonnage between the several carriers, based upon the [346] average percentage of coal carried in prior years by each carrier. The limited character of the coal field, the control of so large a proportion of the deposits and of the transportation, was such as to invite agreements and combinations. A pooling arrangement would largely prevent competition between the otherwise independent groups of carriers and producers. That any such pooling agreement was made is denied most earnestly by all of the defendants. That there occurred a conference in 1896 looking to such an arrangement seems probable on the evidence. But the weight of proof satisfies us that whatever might have been contemplated or attempted, the scheme proved abortive, or, if attempted, was abandoned long before this bill was filed. We do not set out the circumstances which are pointed out as tending to show such an illegal agreement, nor do we deem it necessary to discuss the conflicting direct testimony. We have gone through the record. The facts are discussed and largely set out in the opinion of the court below. Though its judges differed in respect to the relief which might be granted upon other grounds, they agreed in holding that the Government

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had failed to show any contract or agreement for the distribution of tonnage. In this we concur.

THE TEMPLE IRON COMPANY COMBINATION.

2. We come, then, to the several acts, agreements or transactions set out in the seventh paragraph of the bill, two of which are said to have been participated in by all of the defendants, and therefore to constitute evidence of the general combination charged, and to be, in and of themselves, illegal combinations between all of the principal defendants which come under the frame of the bill as in violation of the act of July 2, 1890, 26 Stat. 209, c. 647.

The transactions referred to are introduced immediately following the general charge, and are characterized in the [347] bill as "steps in the development of this illegal combination and in furtherance of its illegal purposes." It is then averred, that "the defendants, or some of them, became parties to the following additional acts, schemes, and contracts, among others, in violation of the aforesaid act of July 2, 1890." This is followed by five distinct paragraphs, each setting out some distinct contract, combination, or agreement alleged to have been the act of all of the defendants, or of two or some number less than all. These alleged "steps" and "additional acts, schemes, and contracts," in violation of the Sherman Law and in furtherance of the alleged illegal general scheme or purpose, are: *a*, the making of the sixty-five per cent contracts with the independent operators; *b*, the absorption by the Erie Railroad of the New York, Susquehanna & Western Railroad Company; *c*, the acquisition by the Reading Company of the majority of the capital stock of the Central Railroad of New Jersey; *d*, the acquisition of the Temple Iron Company, and through it of a large number of collieries, for the purpose of defeating a projected independent line of railway into the coal region; and, *e*, the acquisition by the Erie Railroad Company, while controlling the Hillside Coal & Iron Company, of all of the shares of the Delaware Valley & Kingston Railroad Company, a projected common carrier, and all of the shares of the Pennsylvania Coal Company.

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As we have already stated, two of these transactions are averred to be transactions into which all of the defendants entered in pursuance of a common purpose and general design to suppress competition and restrain commerce in coal between the States.

The first which we shall consider is the alleged combination through the Temple Iron Company. Concerning this, the petition, in substance, states that in 1898 many of the independent coal operators in the Wyoming or northern field became dissatisfied with the transportation [348] and market conditions under which they were obliged to conduct their collieries. Many contracts for the sale of their coal to the defendant coal companies had expired or were about to expire, and they demanded either lower freight rates or better prices from the coal companies. A competing line of railway from the northern or Wyoming zone of the anthracite region to a point on the Delaware River, where connection would be made with two or more lines extending to shipping points at New York Harbor, was projected as a means of relieving the situation. The New York, Wyoming & Western Railroad was accordingly incorporated. Large subscriptions of stock were taken, the line in part surveyed, parts of the right of way procured, and a large quantity of steel rails contracted for. As the road was to be mainly a coal-carrying road, support from coal-mining companies was essential. Its chief backing came from independent coal operators. The most important and influential of them was the firm of Simpson & Watkins, who controlled and operated eight collieries in the region, having an annual output of more than a million tons. The time for such a competing means of transportation was auspicious. Much of the output of the district not tied up by contracts of sale or transportation was pledged to this project and much more was promised.

The petition alleges that the construction of the projected independent railroad would not only have introduced competition into the transportation of anthracite coal to tidewater, but it would have enabled independent operators reached by it to sell their coal at distributing points in free competition with the defendant coal com-

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panies. "*Wherefore*," avers the pleading, "the defendants, the Reading Company, owning the entire capital stock of the Philadelphia & Reading Railway Company, and the other carrier companies defendants herein, controlling collectively all means of transportation between the mines [349] and shipping points at New York Harbor, combined together for the purpose of shutting out the proposed railroad and preventing competition with them in the transportation of coal from the mines to other States, and the sale of coal in competition with their own controlled coal in the markets of other States." The plan devised was to detach from the enterprise the powerful support of Simpson & Watkins and the great tonnage which their co-operation would give to the new road, by acquiring for the combination the coal properties and collieries controlled by that great independent firm of operators. This would not only strangle the project, but secure them forever against new schemes induced by the large tonnage produced by these eight collieries; and secure not only that tonnage for their own lines, but keep the coal forever out of competition with that of their controlled coal-producing companies.

The scheme was worked out with the result foreseen and intended. The capital stock of the Temple Iron Company, aggregating only \$240,000, was all secured. That company was then operating a small iron furnace near Reading. Its assets were small, but its charter was a special legislative charter which gave it power to engage in almost any sort of business, and to increase its capital substantially at will. Control of that company having been secured, it was used as the instrument for the purpose intended.

The plan by which the defendant carriers were enabled to carry out this scheme and apportion among themselves proportionate interests in the property acquired and the burden to be assumed was not simple, but elaborate. The financial arrangements seem to have been made through Mr. Baer, who was the president of and a large stockholder in the Temple Company, and Mr. Robert Bacon, of the firm of J. P. Morgan & Company. Shortly stated, it was this: The Temple Company increased its [350] capital stock to

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\$2,500,000 and issued mortgage bonds aggregating \$3,500,000. Simpson & Watkins agreed to sell to the Temple Company their properties for something near \$5,000,000. They accordingly transferred to the Temple Company the capital shares in the several coal companies, holding the title to their eight collieries, and received in exchange \$2,260,000 in the shares of the Temple Company, and \$3,500,000 of its mortgage bonds. By contemporaneous instruments Simpson & Watkins transferred to the defendant, the Guaranty Trust Company of New York, as trustee, this capital stock and \$2,100,000 of the bonds of the Temple Company, and received from the Guaranty Company \$3,238,396.66 in money and \$1,000,000 in certificates of beneficial interest in the stock of the Temple Company. The Guaranty Company seems to have been but a medium and was accordingly protected by a contemporaneous contract with the Reading Company and the other carrier defendants by which they severally contracted with the Guaranty Company to purchase the Temple Company's capital stock in a certain agreed proportion or percentage of the total capital stock, and to guarantee the bonded debt of the Temple Company in the same proportion. A large proportion of the bonds and of the beneficial certificates of interest in stock of the Temple Company was later guaranteed, or underwritten as the stock phrase goes, by a syndicate including J. P. Morgan, William Rockefeller, the Guaranty Company, and others.

Thus, it came about that when this bill was filed the stock of the Temple Company, which, as seen, is a mere holding company for the several defendant carrier companies, was owned by the defendants, and the obligations of that company were guaranteed by them in proportions based on the percentage of the total anthracite tonnage carried annually by each of the defendant carriers, namely: The Reading Company and the Reading Rail[351]way Company, being treated as one and the same in this matter, 29.96 per cent; the Lehigh Valley Railroad Company, 22.88 per cent; the Central Railroad of New Jersey, 17.12 per cent; the Delaware, Lackawanna & Western Railroad Company, 19.52 per cent; the Erie Railroad Company, 5.84

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per cent; the New York, Susquehanna & Western Railroad Company, 4.86 per cent. At the time this proof was taken the average annual output of the collieries thus acquired was about 1,600,000 tons, and in the last year the output had arisen to 1,950,000 tons. This combination of the defendants through the Temple Iron Company was effective in bringing about the designed result. The New York, Wyoming & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained.

The projected competing railroad was undoubtedly a good faith proposition and held out promise to independent coal operators not only of the prospect of competition in transportation from the mines to tidewater, but the possibility of selling their coal either to the controlled coal companies defendant at better prices or to the consuming public at tidewater in competition with that of the controlled coal companies. But if we assume that its construction was doubtful, the result must be the same as characterizing the purpose and design of the concerted action of the defendants. They were so far convinced of the threatening character of the enterprise that they were moved at great cost to thwart it and at the same time remove the temptation for like competition by securing to themselves forever the product of the collieries named.

That the collieries to be reached by the new road were not all reached by each of the defendants is true. The great bulk of tonnage from them seems to have been carried by the Erie, the Lehigh, and the Lackawanna. But the preservation of the monopoly of transportation [352] from the mines to tidewater held by the six lines which were serving the region, was plainly a common interest—a collective monopoly by which the profits in coal could be secured and the monopoly maintained by shutting out any new line to tidewater. The extent of the interest of each in the desired result seems to have been estimated by themselves as fairly measured by the percentage of the total tonnage theretofore carried annually by each. Thus it was that they became owners of the shares in the Temple Company and guarantors of its obligations in the same proportions.

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It has been suggested that since the New York, Wyoming & Western Railroad has been effectively strangled that it will be idle to enjoin the doing of an act already accomplished. But that is a narrow view of the relief which may be granted under the statute and the frame of this bill.

The combination by means of the Temple Company still exists. It has been and still is an efficient agency for the collective activities of the defendant carriers for the purpose of preventing competition in the transportation and sale of coal in other States.

That under the law of Pennsylvania each of the defendant carrier companies has the power to acquire and hold the stock of coal-producing companies may be true. That the Temple Company may, under the same law, have the power to acquire and hold the capital stock of the Simpson & Watkins' collieries may also be conceded. But if the defendant carriers did, as we have found to be the fact, combine to restrain the freedom of interstate commerce either in the transportation or in the sale of anthracite coal in the markets of other States, and adopted as a means for that purpose the Temple Company, and through it, the control of the great Simpson & Watkins' collieries, the parts of the general scheme, however lawful considered alone, become parts of an illegal combination [§53] under the Federal statute which it is the duty of the court to dissolve, irrespective of how the legal title to the shares is held. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 291. So long as the defendants are able to exercise the power thus illegally acquired, it may be most efficiently exerted for the continued and further suppression of competition. Through it, the defendants, in combination, may absorb the remaining output of independent producers. The evil is in the combination. Without it the several groups of coal-carrying and coal-producing companies have the power and motive to compete. That each may for itself advance the price of coal or cut down the production, is true. But in the power which each other group would have to compete would be found a corrective. The statute forbids the concerted action which has already brought about the stran-

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gling of a projected competing railroad and the complete control of the sale of an immense tonnage of independent coal which had prior thereto not only been a menace to their collective control of the means of transportation to New York Harbor points, but a large competing factor in sales at these points. The Temple Company, therefore, affords a powerful agency by means of which the unlawful purpose which induced its acquisition may be continued beyond the mere operation of the Simpson & Watkins' collieries.

Its board of directors includes the presidents of the defendant carriers, who also are the presidents of the defendant coal companies, and these defendant companies absolutely dominate its affairs. The Temple Company also owns and dominates the great collieries obtained from Simpson & Watkins. Its board of directors, composed as it is of men representing the defendants, supplies time, place, and occasion for the expression of plans or combinations requiring or inviting concert of action. Though as a board it may not dictate the activities of [354] the owning corporations, still, in view of the relation of the Temple Company to the defendant carriers and their respective coal-mining companies, and of the constitution of its directors, the attitude of its board as indicated by the proceedings spread upon the corporate minutes is of significance upon the question of the existence of any concerted purpose to unite the activities of its corporate owners to suppress competition. There are to be found on the minutes of the Temple Company a number of entries which point strongly to combinations between the defendants. Thus, on June 27, 1899, a committee was appointed to consider the establishment of a statistical bureau, "to keep a record of all matters of interest to the anthracite companies." What resulted does not appear from any further minutes. On July 2, 1901, a resolution in these words was adopted:

"Resolved, That Mr. Cumming, Mr. Sayre, Mr. Henderson, Mr. Caldwell, and Mr. Warren be appointed a committee to consider the advisability and expediency of making a 40 per cent rate to outside shippers, or a flat rate, and, if so, what rate."

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By "outside shippers" the witness says was meant "independent operators," who shipped their own coal. The witness by whom this action was proved says that he never saw the report and does not know that any was made by the committee. It is true that Mr. Baer, the president of the Temple Company, denied that the Temple Company had or undertook to exercise any power in respect of carrier rates, or in fixing prices of coal. He says that the minute entries referred to above are matters "interjected by somebody," under a misconception of the powers and duties of the directors of that company, and came to nothing. That he shortly took the presidency himself and that the Temple Company "has been run as the most harmless mining company in the State of Pennsylvania," and has had nothing to do with the [355] price of coal or with rates for transportation. But this disclaimer of power does not detract from the significance of the minutes of the board referred to as evidence bearing upon the question of the relation of the several defendants to each other.

We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the States in plain violation of the act of Congress of July 2, 1890.

8. We come now to the sixty-five per cent contracts.

The charge of the petition in respect to these contracts is substantially this:

a. That the defendant carriers possessed a substantial monopoly of all of the means of transportation between the coal region and tidewater.

b. That they directly or indirectly through their controlled coal companies produced about seventy-five per cent of the annual supply of anthracite coal.

c. That twenty per cent or more of the annual supply was produced by independent operators, whose collieries were located contiguous to the carrier lines of the defendant companies.

d. This being the situation, it is charged, that for the purpose of preventing the output of these independent pro-

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ducers "from being sold throughout the several States in competition with the output from their own mines or of the mines of their subsidiary coal companies, the said defendant carriers, having almost a complete monopoly of the means of transportation between the anthracite mines and tidewater, entered into and now maintain an agreement, combination, or conspiracy to use their power as said carriers to obtain control of the sale and disposition of the aforesaid output of the independent mines in the markets of the several States, particularly [356] of the great distributing market at New York Harbor, in violation of the aforesaid act of July 2, 1890."

It is further averred:

e. That prior to 1900 the defendants "severally made" a large number of short-term contracts for the purchase of the coal of independent operators "along their respective lines," at prices ranging from fifty-five to sixty per cent of the average price at tidewater.

That upon the termination of these contracts the defendants "in pursuance of a previous agreement between themselves, severally offered to make and did make and conclude with nearly all of the independent operators along their lines new contracts containing substantially uniform provisions agreed upon beforehand by the defendant carriers in concert, some of the operators contracting with one of the defendants and some with another," by which such operators "severally agreed" to deliver on cars at breakers "to one or the other of the defendant carriers, or its subsidiary coal company, all the anthracite coal thereafter mined from any of their mines now opened and operated, or which they might thereafter open and operate, deliveries to be made from time to time as called for," etc. In consideration, the sellers were to receive for prepared sizes sixty-five per cent of the general average price prevailing at tidewater points at or near New York as computed from month to month; this average price to be settled by an expert agreed upon by the parties.

It is further averred that this price was such as to enable the independent operator entering into one of these con-

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tracts to realize upon his coal from fifteen to fifty cents more than he could when shipping on his own account after paying the established rates of transportation, waste and cost of selling, in competition with the coal of the defendants. That the difference was the price paid for the privilege of controlling the sale of the independent [357] output, "so as to prevent it from selling in competition with the output of their own mines."

It is then further alleged that the result of this plan, "as was intended, was to draw, if not to force, the great body of independent operators into making the aforesaid contracts, thereby enabling the defendants to control absolutely, and until the mines are exhausted, the output of most of the independent anthracite mines, and to prevent it, as aforesaid, from being sold in competition with the output of their own mines in the markets of the several States, particularly in the great tidewater markets."

It is obvious that the averments do not touch upon the legality of the contracts considered severally, and ask no relief upon the theory that each was a contract in restraint of trade. The theory and charge of the bill is that by concerted action between the defendants the independent operators were to be induced to enter singly into uniform agreements for the sale of the entire output of their several mines and any other they might thereafter acquire, excluding a negligible amount of unmarketable coal and coal for local consumption. And the further theory of the pleading is that by such concerted action and through the higher price offered, the defendants would obtain such control of independent coal as to prevent competition in the markets of other States.

It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens v. Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices

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between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot [358] would be unlawful. Thus in *Swift & Company v. United States*, 196 U. S. 375, 396, where a plan or scheme consisting in many parts or elements was averred to constitute a combination forbidden by the act of July 2, 1890, it was said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

That the plan was calculated to accomplish the design averred, in the present case, seems plain enough. The anthracite field was very limited. The means for transportation from the mines to seaboard shipping points were in the hands of the defendant carriers. They, together with their subsidiary companies, controlled about ninety per cent of the coal deposit and about seventy-five per cent of the annual output. If the remaining output, that of the independent operators along their several lines, could be controlled as to production and sale at tidewater points, there would inevitably result such a dominating control of a necessity of life as to bring the scheme or combination within the condemnation of the statute.

That these sixty-five per cent contracts were the result of an agreement through protracted conferences between the independent operators, acting through an authorized committee, and officials of the carrier defendants, who were likewise officials of the coal companies subsidiary to the railroad companies, is plainly established. That they were designed by the defendants [359] as a means of controlling the sale of the independent output in the market at tidewater points, thereby preventing competition with their own coal and as a plan for removing the great tonnage controlled by the independents from being used as an inducement for the

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entry of competing carriers into the district, is a plain deduction.

Some of the facts which lead to this conclusion will be referred to as briefly as the great importance of the case will permit:

That for a long time many of the independent operators had been selling their output to their great rivals, the defendant carriers and their several coal companies, is true. By means of such sales and deliveries at their own breakers, the sellers avoided freight, waste, and expense of sales through agents, etc. The price they would thereby realize was fixed, and they were not dependent upon a fluctuating market. So long, therefore, as they could sell to their rivals at their breakers to better advantage than they could ship and sell on their own account, the method appealed to them. But, obviously, buyer and seller were not upon an equal plane. The former had control of freight rates and car service. The seller must pay the rate exacted and accept the car service supplied him by the buyer, or appeal to the remedies afforded by the law. If the rate of freight to tide-water was onerous and was imposed upon the coal produced by the defendants and their allied coal producers without discrimination against the coal of the independent shipper, it would nevertheless bear upon the latter oppressively, since the rate paid would find its way into the pocket of the defendants. Therefore it was that the higher the freight rate, the greater the inducement to sell to the carrier companies. That the conditions were not accepted by the independent producers as satisfactory, is evident. The majority at all times stood out, and those making such agreements as well as those refusing to do so, maintained [360] an agitation for better freight rates and better prices for those who preferred to sell at their breakers. For many years before this proceeding they maintained an organization called the Anthracite Coal Operators' Association, and through that body endeavored to improve their situation.

The series of contracts here involved were all made since 1900, and are therefore subsequent to the combination through the Temple Iron Company, already considered.

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The charge is that since that combination the defendants further combined through these contracts. Prior to 1900, we find no evidence of any combination or agreement for the procurement of contracts of sale with independent operators. Upon the contrary there is much to indicate that there was more or less competition for coal accessible to more than one of the buying defendants. The effect of competition is shown by the gradual rise in the price the great companies were willing to pay. In the earliest stages of the business the buying price seems to have been fixed with some relation to the varying wage scale of miners. This gave way to an agreed percentage of the current price at tidewater. Thus the earlier contracts allowed the selling operator only forty per cent of the tidewater price for prepared sizes. Through competition between the existing companies, and through that which resulted from the entry of new carrier lines with their subsidiary coal companies, the price was forced gradually up from forty to sixty per cent of the tidewater price, and at this latter figure the price stood when the combination here averred came into existence.

We have mentioned the influence of the coming into the region of new coal-carrying railroads upon the per cent of the tidewater price which the independent operators were able to obtain from the buying coal companies. This influence, as we shall see, was a large factor in bringing about the contracts now in question. The carriers [361] here defendant did not all obtain their footing in this anthracite field at the same time. Thus, when the New York, Susquehanna & Western was projected, it, through its coal company, offered to buy coal on fifty per cent contracts. The price before that had been forty to forty-five per cent. The result was that the other companies came gradually up to the same price. This was late in the eighties, the exact date not being at hand. Again, it is said in the brief for the defendants, that:

"In the early 90's, the New York, Ontario & Western Railroad built a branch into the Wyoming region and sought tonnage. Mr. Stargis was commissioned beforehand by the coal company of that railroad to offer 60 per cent contracts on the understanding that, if he could secure a half million tons annually, the branch would be

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built. The branch railroad was built, and by its help large new acreages of coal lands were developed, tributary to the Ontario & Western Railroad."

As a consequence, says the same brief, "the other coal companies began to raise their rates to 60 per cent," and by 1892 that had become the settled price.

The influence of competition, actual or threatened, was also illustrated in 1898, when the New York, Wyoming & Western was projected. A large number of coal contracts had expired or were about to expire, thus creating a great tonnage open to competition. Many of the operators in the Wyoming region of the coal field united their influence to procure the building of a competing line between the mines and New York Harbor points. To this end a large tonnage was pledged to its coal-selling company, which offered to pay 65 per cent of the tidewater price to such operators. How and why that project failed we have already shown in the section of this opinion devoted to the Temple Iron Company combination.

When that effort failed there arose a movement for a [362] new road from the mines to tidewater through the Pennsylvania Coal Company. That was one of the greatest of the independent companies, producing in 1899 about two million tons. It controlled a coal-gathering railroad called the Erie & Wyoming Valley Railroad, and proposed its extension to Lackawaxen, and to cause the construction from that point of a railroad line to the Hudson River. To this end it caused to be organized the Delaware Valley & Kingston Railroad. Of this project, Mr. Thomas, the president of the Erie Railroad Company, said: "They were threatening and had started to build a competing road to the Hudson River." The independent operators, in an association maintained by them for their mutual protection, hailed this scheme with joy. At a meeting of the association on November 22, 1899, the following minute was made:

"Mr. E. L. Fuller, chairman of the executive committee, on being called upon, told of the efforts which have been made to induce the various anthracite railroads to offer more satisfactory terms for the purchase of the operators' coal, and of the absolute failure of these efforts to bring about any definite result. He then reported the organization of the Delaware Valley & Kingston Railroad, backed by

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the Pennsylvania Coal Company, and the proffer of this latter company to purchase coal from operators in the Wyoming and Lehigh region, paying 65 per cent of the tidewater price for chestnut and larger; 50 per cent for pea coal, and a flat 85 per cent freight rate on buckwheat and smaller sizes. These contracts were to be for all of the coal in the ground, thus settling permanently the price which the operator would receive.

"After extended discussion as to the details of these contracts, and a compromise with the results obtained under the old contracts, the following resolution was offered and passed unanimously:

"Whereas the Erie & Wyoming Valley Railroad Com- [363] pany has arranged to build a branch line from Hawley, Pa., to a point on the boundary line between New York and Pennsylvania at Lackawaxen, forming a connection with a railroad proposed to be constructed by the Delaware Valley & Kingston Railroad Company to tidewater, at Kingston, on the Hudson River;

"And whereas the construction of the said railroads is approved and promoted by the Pennsylvania Coal Company, which has large interests in the anthracite coal region;

"And whereas the independent operators and the general public are now largely at the mercy of the existing railroad companies, which charge unreasonable rates for their services, owing in part to the large amounts for which the said companies have been capitalized;

"And whereas it would be highly advantageous to all the independent owners of coal properties throughout the entire anthracite region of Pennsylvania to have the railroad connection, now proposed, completed as speedily as possible;

"And whereas it is equally desirable, in the interests of the people of the State of New York and the public in general, that such railroad connection shall be made (since it will necessarily result in a material reduction of the price paid for anthracite coal by consumers): Now, therefore, it is

"Resolved, I. That this association hereby expresses its hearty and unqualified approval of the proposed plan for the construction of the said railroads, and hereby pledges its constant support and active assistance in promoting the speedy construction and completion of the said railroads.

"II. That a committee of three be appointed by the president, of which the president shall be a member, to take such steps as may be deemed advisable toward furthering the said plans and co-operating with the said com- [364] panies for the completion of the said railroads, and that a report of their proceedings be submitted to the next meeting of this association."

"In the discussion which followed, it was the opinion of those present that, in view of the hearty assistance which had been accorded the operators by the Pennsylvania Coal Company, it was the duty of the members to give to this company all of the tonnage which

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they could deliver and not to permit any more advantageous offers which the older companies might make to divert freight from a road which was constructed to give the operators a fair share in the selling price. A vote of thanks was accorded Mr. Fuller for his labor and great success in accomplishing a work which was for the advantage of every individual operator in the anthracite regions."

It is enough to say of this project that it was abandoned when, in 1901, the Erie Railroad acquired, without any concert of action between it and the other carrier defendants, the capital stock of the Pennsylvania Coal Company, which carried with it the capital stock of the Erie & Wyoming Valley Railroad and the Delaware & Kingston Railroad.

The persistent effort of the independents to bring into the field competing carrier and coal-producing companies was a menace to the monopoly of transportation from that field to tidewater which the defendants collectively possessed. The independent output was one-fourth of the annual supply. It was mainly sold at tidewater, where it came into active competition with the larger production of the defendants; but, as we have already seen, this enormous tonnage offered a great inducement to the organization of new carrier lines from the mines to the seaboard. The contracts theretofore made for the purchase of this output had been for short terms. The expiration of a considerable number had more than once been the occasion for new carrier projects backed by the [365] independent operators. To renew the contracts for short terms would but postpone the day of competition. The control in perpetuity of such a large proportion of the output as would prevent in the future effective competition in the selling markets of the coast, and at the same time remove inducement to the entry of other lines of carriers, was the obvious solution of the situation. The necessary control could only come about through concerted action. If one of the several independent groups of defendants, or two, or any less number than all, had sought to obtain control it would have been resisted by those not included. Therefore, it is plain that if the coal of these operators was to be placed in such situation as that it could not affect the price of their own coal, nor longer constitute a mass of tonnage sufficient to invite the construction

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of new lines from the mines to the sea, it must be brought about through the concerted action of the defendants.

In 1900 there occurred the great strike of the coal miners. Settled by arbitration in the fall of that year, the miners obtained a ten per cent increase in wages. Of course, this affected the railroad coal-producing companies and the independent coal companies alike. The great companies took the lead in the arbitration and accepted the result. The independent companies were compelled to follow this lead. The latter, as we have seen, had before the strike been particularly urgent in their efforts to secure better conditions from the railroads and their allied coal companies. This rebellious attitude is partially shown by the resolution of the Anthracite Coal Operators' Association of November 22, 1899, heretofore set out. When the strike settlement was made, there was some hesitation among the independent operators about posting notice of the advance in wages, and through committees they urged upon the defendants that such advance in wages justified a reduction in freight rates and a price of not less [366] than sixty-five per cent for coal sold to the defendant companies. The committees reported back that they could not obtain "any definite promise," but there has been "an intimation" that something would be done to improve the present conditions. It was thereupon resolved that the advance scale should be posted, and that a committee should be appointed "to confer with the various carrier companies relative to a new contract." At the same meeting a number of the operators present signed an agreement empowering the committee named "to adjust all differences with certain transportation companies," and agree upon a basis of contract which should definitely and for a period of years fix the commercial relations between the said operators and the transportation companies, "each of the parties agreeing to make a particular contract for himself with the proper transportation company." This agreement, after being signed by those present, was placed in the hands of Mr. McNulty to secure further signatures. These matters appear on the minutes of the individual operators of October 5. There

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ensued a number of conferences between the representatives of the sellers and buyers. The result was that a form of contract and a price was mutually agreed upon, being the form of the sixty-five per cent contracts, which were thereafter entered into as the short-term agreements theretofore made expired. Thus the independents put in force the advance wage scale imposed by the strike arbitrators before any agreement whatever was made or promised by the defendants. This increased scale which the arbitration imposed having been accepted by the large companies, could not be successfully resisted by the independents. It only operated to make them more persistent in their demand for some improvement in the methods and prices theretofore prevailing.

That the defendant companies should offer such terms is not surprising. The contracts to be made would be not [337] only for the life of the mines being operated at the date of the sale, but was to extend to any other mines thereafter opened by the seller. The menace of the independent output as an invitation to competing carriers and as a competing coal at tidewater would be removed forever.

Upon this aspect of the case we find ourselves in agreement with Judge Buffington, who concluded a discussion of the evidence by saying (183 Fed. Rep. 474) :

"By such perpetual contracts * * * these defendant railroads through their subsidiary coal companies severally made with other collieries these combiners withdrew, and still continue to withdraw, such product, for all time, from competition, either in interstate transportation or sale. To my mind there is no more subtle and effective agency for the gradual, unnoted absorption by interstate carriers of the remaining interstate product than these perpetual contracts. Holding then that they are in the words of the statute, 'contracts * * * in restraint of trade or commerce among the States,' I record my dissent to the action of the court in refusing to enjoin them."

The coal contracts acquired when this proceeding was begun aggregated nearly one-half the tonnage of the independent operators. Much of the coal so brought was sold in Pennsylvania and all of the contracts were made in that State and the coal was also there delivered to the buying defendants. That the defendants were free to sell again

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within Pennsylvania or transport and sell beyond the State is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tidewater, and the sales were made upon the basis of the average price at tidewater. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the [368] general consuming markets of other States. "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Company v. United States*, 196 U. S. 375, 398; *Loewe v. Lawler*, 208 U. S. 274. The purchase and delivery within the State was but one step in a plan and purpose to control and dominate trade and commerce in other States for an illegal purpose. As was said by the Chief Justice, in *Loewe v. Lawler* (p. 301), cited above:

"Although some of the means whereby the interstate traffic was to be destroyed were acts within a State, and some of them were in themselves as a part of their obvious purpose and effect beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial."

The general view which this court took of the effect of these contracts upon interstate traffic in the coal of this region is indicated in *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 42. The concerted plan concerned the relations of these railroads to their interstate commerce and directly affected the transportation and sale and price of the coal in other States. The prime object in engaging in this scheme was not so much the control and sale of coal in Pennsylvania, but the control of sales at New York Harbor.

That per cent of the average price at tidewater retained by the buyer was assumed to cover the freight, waste, and

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cost of sale. There is evidence tending strongly to show that an independent accepting one of these con[369]tracts realized slightly more than he could realize if he had shipped and sold on his own account. This advanced price, therefore, as charged in the bill, constituted a great inducement to draw the independents within the control of the defendants, and makes it highly probable that if not enjoined they will absorb the entire independent output.

The defendants insist that these contracts were but the outgrowth of conditions peculiar to the anthracite coal region and are not unreasonably in restraint of competition but mutually advantageous to buyer and seller.

That the act of Congress "does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose" was pointed out in the *Standard Oil Case*, 221 U. S. 1. In that case it was also said that "the words 'restraint of trade' should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect." We reaffirm this view of the plain meaning of the statute, and in so doing limit ourselves to the inquiry as to whether this plan or system of contracts entered into according to a concerted scheme does not operate to unduly suppress competition and restrain freedom of commerce among the States.

Before these contracts there existed not only the power to compete but actual competition between the coal of the independents and that produced by the buying defendants. Such competition was after the contracts impracticable. It is, of course, obvious that the law may not compel competition between these independent coal operators and the defendants, but it may at least [370] remove illegal barriers resulting from illegal agreements which will make such competition impracticable.

Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and

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commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. *United States v. St. Louis Terminal Association*, 224 U. S. 383, 394; *Swift & Co. v. United States*, 196 U. S. 375.

In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output, which constituted the only competing supply, affords evidence of an intent to suppress that competition and of a purpose to unduly restrain the freedom of production, transportation, and sale of the article at tidewater markets.

The case falls well within not only the *Standard Oil and Tobacco Cases*, 221 U. S. 1, 106, but is of such an unreasonable character as to be within the authority of a long line of cases decided by this court. Among them we may cite: *Northern Securities Company v. United States*, 193 U. S. 197; *Swift & Co. v. United States*, 196 U. S. 375; *National Cotton Oil Company v. Texas*, 197 U. S. 115; *United States v. St. Louis Terminal Association*, 224 U. S. 383; and the recent case of *United States v. Union Pacific Railway*, *ante*, p. 61.

We are thus led to the conclusion that the defendants did combine for two distinct purposes—first, by and through the instrumentality of the Temple Iron Company, [371] with the object of preventing the construction of an independent and competing line of railway into the anthracite region; and, second, by and through the instrumentality of the sixty-five per cent contracts, with the purpose and design of controlling the sale of the independent output at tidewater.

The acts and transactions which the bill avers to have been committed by some of the defendants in furtherance

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of the illegal plan and scheme of a general combination are these:

a. The absorption in January, 1898, of the New York, Susquehanna & Western Railroad, through the purchase by the Erie Railroad of a large majority of its shares, whereby two lines of competing railroad came under one control and management.

b. The acquisition in 1901 of a controlling majority of the capital stock of the Central Railroad of New Jersey by the Reading Company, which then owned the entire capital stock of the Philadelphia & Reading Railway Company, and the Philadelphia & Reading Coal & Iron Company, "thereby uniting and bringing together under a common head and source of control the said Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey, operating parallel and competitive lines of railroad, and the said Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkes-Barre Coal Company," theretofore owned or controlled by the Central Railroad of New Jersey, thereby destroying competition between former competing carriers and coal-producing companies.

c. The absorption in 1899 by the Erie Railroad Company of the Pennsylvania Coal Company, thereby acquiring the stock control of the Erie & Wyoming Railroad Company and of the Delaware Valley & Kingston Railroad, thus defeating a projected construction of the last-named railroad.

[372] These were all minor combinations in which only some of the defendants participated. The accomplishment of these several subordinate transactions only completed one or another of the several groups of carriers and coal-producing companies, which several groups were thereafter not only possessed of the power to compete with every other group, but, as we have already seen, were actually engaged in competing, one with another, prior to the general combination through the Temple Iron Company and the sixty-five per cent contract scheme.

So far as this record shows not one of these transactions was the result of any general combination between all of the defendants and constituted no part of any such general combination. None of the defendants had any part or lot

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in bringing them about except the particular combining companies.

It is true that the bill asks injunctions against the continuance of each of these minor combinations. But if, as we conclude, they did not constitute any part of any general plan or combination entered into by all of the carrier companies, their separate consideration as independent violations of the act of Congress is not admissible under the general frame of this bill. To treat the bill as one seeking to apply the prohibition of the act of Congress to each one of these independent combinations would condemn the pleading as a plain misjoinder of parties and of causes of suit, and a plain confession of multifariousness. All of the defendants had a common interest in the defense of the Temple Iron Company combination, and that of the sixty-five per cent contracts, because it was alleged that all had joined therein. But all of the defendants did not have a common interest in the defense of these three minor combinations, unless it appear that they were, as charged, "steps," or acts and agreements in furtherance of the general combination to which they were all parties. This we find not to be the fact. If, therefore, we shall [373] treat the bill as broad enough to involve combinations which were not steps or acts in furtherance of any general combination, we shall overrule the objection of multifariousness made below and here, for we shall then maintain a bill setting up three separate and distinct causes of action against the distinct groups of defendants, one having no interest in or connection with the other. The grounds of each suit would be different and the parties defending different. See the discussion and cases cited in *Simpkins' Federal Equity Suit*, pp. 290 *et seq.*

Having failed to show that these minor combinations were acts in furtherance of the general scheme, or the acts of the combiners in the two combinations condemned, we are asked to deal with them as separate, illegal combinations by such of the defendants as participated. This the court below declined to do, and we in this find no error.

As to the legality of the minor combinations, we therefore express no opinion. We affirm the action of the court below in declining to enjoin them, because to construe the

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bill as directed against them as independent combinations, between some but not all of the principal defendants, would make the pleading objectionably multifarious. We therefore direct that the bill be dismissed, without prejudice, in so far as it seeks relief against the three alleged minor combinations.

The decree of the court below is affirmed as to the Temple Iron Company combination. It is reversed as to the sixty-five per cent contracts, and the case will be remanded with direction to enter a decree canceling each of these contracts, and perpetually enjoining their further execution, and for such proceedings as are in conformity with this opinion.

Mr. Justice DAY, Mr. Justice HUGHES, and Mr. Justice PITNEY did not participate in the consideration or decision of this case.

UNITED STATES v. READING COMPANY.*

TEMPLE IRON COMPANY v. UNITED STATES.

READING COMPANY v. UNITED STATES.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 198, 206, 217. Motions to modify decree submitted January 28, 1913.—Decided April 7, 1913.

[227 U. S. 158.]

The mandate in this case modified as to certain of the independent companies having some of the sixty-five per cent contracts referred to in the opinion, 226 U. S. 824.^b

The facts are stated in the opinion.

* For opinion of the Circuit Court (188 Fed. 427), see volume 3, page 868. For former opinion of the Supreme Court (226 U. S. 824), see *ante*, page 694. For opinion of the District Court in later case (226 Fed. 229), see volume 6, page 290.

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Order and Opinion of the Court.

Mr. Adelbert Meert for the Hillside Coal & Iron Company.

Mr. William S. Jenney and *Mr. John G. Johnson* for the Delaware, Lackawanna & Western Railroad Company.

Mr. Gilbert Collins and *Mr. William H. Corbin* for the New York, Susquehanna & Western Coal Company.

[159] *Mr. George F. Brownell* for the Pennsylvania Coal Company.

Mr. Frank H. Platt for the Elk Hill Coal & Iron Company.

Mr. Attorney General Wickersham, *Mr. James C. McReynolds*, and *Mr. G. Carroll Todd* for the United States.

The following order was entered:

This cause came on again to be heard upon five several petitions filed by the Pennsylvania Coal Company, the Elk Hill Coal & Iron Company, the New York, Susquehanna and Western Coal Company, Hillside Coal & Iron Company, and the Delaware, Lackawanna & Western Railroad Company, parties to the cause as alleged holders of sixty-five per cent coal contracts, praying that the direction in the opinion heretofore filed that the cause should be remanded with direction to enter a decree canceling each and every of the sixty-five per cent contracts referred to in the pleadings held by any of the parties to the cause, and for a modification of the mandate so as to exclude from cancellation the five several contracts described and referred to in the said five separate petitions.

And it appearing that the United States, by its Attorney General, has answered the several petitions, and that in respect to that of the Pennsylvania Coal Company assents to the petition and consents that such modification be made as to dismiss the bill in so far as it is thereby sought to cancel the contract between the Pennsylvania Coal Company and the Elk Hill Coal & Iron Company of March 1, 1902,

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referred to in the petition of the Pennsylvania Coal Company, upon the concession that the agreement "is substantially different from the series of agreements known as the sixty-five per cent contracts adjudged unlawful by this court," it is accordingly so ordered.

[160] As to the applications of the four other petitioners named above for like relief, the United States denies and contests the right of each, contending that in substance and principle the facts in respect of each of the contracts in respect of which relief is sought, are not similar to the contract between the Pennsylvania Coal Company and the Elk Hill Coal & Iron Company, but fall within the general series of the sixty-five per cent contracts condemned by the judgment of this court.

Upon this issue the transcript is confusing and the briefs inadequate. The court therefore deems it wise in the exercise of its judgment to decline any determination of the question upon the present record. It is therefore ordered that the mandate of this court be so modified as to exclude from the direction to cancel the sixty-five per cent contracts referred to in the pleadings the said contracts mentioned in the four petitions, namely, that of the Elk Hill Coal & Iron Company, the New York, Susquehanna & Western Coal Co., Hillside Coal & Iron Company, and the Delaware, Lackawanna & Western Railroad Company, and that the cause, so far as concerns the contracts of the said petitioners, be remanded to the district court with direction to hear and determine the merits as presented by said petitioners, and make such decree as law and justice require.

Per Mr. Justice LURTON.

Mr. Justice DAY, Mr. Justice HUGHES, and Mr. Justice PRIMER did not participate in the original case, nor in the making of this order.

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UNITED STATES *v.* PATTEN.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

No. 282. Argued November 9, 10, 1911; reargued October 23, 24,
1912.—Decided January 6, 1913.

[226 U. S., 525.]

On appeal under the Criminal Appeals Act of March 2, 1907, this court must accept the lower court's construction of the counts, and its jurisdiction is limited to considering whether the decision of the [526] court below that the acts charged are not criminal is based upon an erroneous construction of the statute alleged to have been violated.^b

In order to decide whether acts charged are within the condemnation of a statute, the court must first ascertain what the statute does condemn and that involves its construction.

On appeal under the Criminal Appeals Act of 1907 this court must assume that the counts of the indictment adequately allege whatever the lower court treated them as alleging; and, where its decision shows that it assumed that every element necessary to form a combination was present, this court has jurisdiction to determine whether such a combination was illegal under the statute which defendants are charged with violating.

A conspiracy to run a corner in the available supply of a staple commodity which is normally a subject of interstate commerce, such as cotton, and thereby to artificially enhance its price throughout the country, is within the terms of § 1 of the Anti-Trust Act of July 2, 1890.

Section 1 of the Anti-Trust Act is not confined to voluntary restraints but includes involuntary restraints, as where persons not engaged in interstate commerce conspire to compel action by others or create artificial conditions, which necessarily affect and restrain such commerce.

A combination otherwise illegal under the Anti-Trust Act as suppressing competition, is not the less so because for a time it may tend to stimulate competition—and so held as to a corner in cotton. The Anti-Trust Act does not apply to a combination affecting trade or commerce that is purely intrastate, or where the effect on interstate commerce is merely incidental and not direct; but although carried

* For opinion of the Circuit Court (187 Fed. 664), see *ante*, page 274.

^b Syllabus and statements of arguments copyrighted, 1912, 1913, by The Banks Law Publishing Company.

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on wholly within a State, if the necessary operation of a combination is to directly impede and burden the due course of interstate commerce, it is within the prohibition of the statute; and so held as to a corner in cotton to be run in New York City.

Persons purposely engaging in a conspiracy which necessarily and directly produces the result which a prohibitory statute is designed to prevent are, in legal contemplation, chargeable with intending to produce that result; and so held that if the details of the conspiracy are alleged in the indictment an allegation of specific intent to produce the natural results is not essential.

The character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

187 Fed Rep. 684, reversed.

[57 L. Ed. 333.*]

[APPEAL—BY GOVERNMENT IN CRIMINAL CASE—SCOPE OF REVIEW.—The Federal Supreme Court, when reviewing, under the Criminal Appeals Act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564), the judgment of a Federal circuit court whose ruling sustaining a demurrer to certain counts in an indictment charging violations of the Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 8200), was based upon the construction of that statute, must accept the circuit court's construction of the counts of the indictment, and can consider only whether the decision that the acts charged are not condemned as criminal by the statute is based upon an erroneous construction of that statute.

For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.

APPEAL—BY GOVERNMENT IN CRIMINAL CASE—CONSTRUCTION OF STATUTE.—A judgment of a Federal circuit court sustaining a demurrer to certain counts in an indictment charging violations of the Anti-Trust Act of July 2, 1890, upon the ground that the acts charged are not within the condemnation of that statute, is based upon a construction of such statute within the meaning of the act of March 2, 1907, governing the right of the Government to a review in a criminal case.

For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.

MONOPOLY—CONSPIRACY IN RESTRAINT OF TRADE—CORNER IN COTTON.—A conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of interstate trade

*The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 57, page 333, Lawyers Edition, Supreme Court Reports. Syllabus copyrighted, 1912, 1913, by The Lawyers Co-Operative Publishing Company.

Statement of the Case.

and commerce, to be accomplished by purchases for future delivery, coupled with a withholding from sale for a limited time; thereby enhancing artificially its price to all buyers throughout the country, is within the terms of the Anti-Trust Act of July 2, 1890, § 1, which makes it a criminal offense to engage in a conspiracy in restraint of interstate commerce, since by its necessary operation it will directly and materially impede and burden such commerce.

For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.

MONOPOLY—CONSPIRACY IN RESTRAINT OF TRADE—INVOLUNTARY RESTRAINT.—Involuntary restraints upon interstate commerce, the result of a conspiracy between persons not themselves engaged in such commerce, to compel action by others, or to create artificial conditions which necessarily impede or burden the due course of such commerce, or restrict the common liberty to engage therein, are comprehended by the provisions of the Anti-Trust Act of July 2, 1890, § 1, which make it a criminal offense to engage in a conspiracy in restraint of interstate commerce, as well as voluntary restraints produced by an agreement between persons so engaged to suppress competition among themselves.

For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.

MONOPOLY—COMBINATIONS IN RESTRAINT OF TRADE—TEMPORARY STIMULATION OF COMPETITION.—A conspiracy to corner the market in a commodity, though it may tend to stimulate competition for a time, is within the provisions of the Anti-Trust Act of July 2, 1890, making it a criminal offense to engage in a conspiracy in restraint of interstate commerce, if it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically, the same evils as does the suppression of competition.

For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.

CRIMINAL INTENT—CONSPIRACY IN RESTRAINT OF TRADE.—Persons engaging in a conspiracy which necessarily and directly will impede and burden interstate commerce, contrary to the act of July 2, 1890, § 1, making it a criminal offense to engage in a conspiracy in restraint of interstate commerce, are chargeable with intending that result.]

For other cases, see Criminal Law, 34-36, in Digest Sup. Ct. 1908.

[527] The facts, which involve the jurisdiction of this court under the Criminal Appeals Act of March 2, 1907, and whether a corner in cotton constitutes an illegal combination under the Sherman Anti-Trust Act, are stated in the opinion.

Argument for the United States.

*The Solicitor General for the United States.**

The seventh count of the indictment charged that the defendants conspired to run a "corner" in cotton.

In construing the indictment the lower court held that the corner charged was an illegal combination, saying: "Corners are illegal. They are combinations contrary to public policy, and all contracts and undertakings in support thereof are void. * * * A corner is altogether wrong, both from a legal and an economical standpoint. * * * The combination described in these counts is negatively illegal without any prohibitory statute and would be positively unlawful in any State having a statute against corners."

Therefore, this court must assume that the indictment sufficiently alleged the existence of an illegal corner, as this court is bound by the construction which the lower court places upon the language used in the indictment. *United States v. Keitel*, 211 U. S. 370; *United States v. Biggs*, 211 U. S. 507.

Contracts of purchase or sale for future delivery are valid even though (1) the purchaser's object is pure speculation and he intends not to receive any pay for them but he expects to resell them before delivery; (2) the seller has not the goods in his possession and has no means of obtaining them except by subsequently purchasing them, and (3) the parties at the time of delivery in fact settle upon the "difference" in price without an actual delivery. [528] It is only when both parties at the time of the contract intend to settle upon "differences" that the contract becomes illegal. *Sawyer, Wallace & Co. v. Taggart*, 14 Bush, 727; *Bibb v. Allen*, 149 U. S. 481, 492; *Clews v. Jamieson*, 182 U. S. 461, 489-495; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 248; *Forget v. Ostigny*, App. Cas. (1895) 318.

A corner is a combination for the purpose of buying up for future delivery the greater portion of the available supply of a given commodity and entering into contracts for the future delivery of more than the available supply,

*Mr. Solicitor General Lehmann for the United States on the first argument.

Argument for the United States.

and holding the same back from sale and not assigning or transferring the contracts of sale until the demand shall so outrun the supply as to enable the operators of the corner to advance the price abnormally. *Black's Law Dictionary*, 271; 9 Cyc. 978; *Booth v. Illinois*, 184 U. S. 425, 430.

Corners have universally been held to be illegal because affecting the natural course of trade and commerce and tending to enhance prices. *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558; *Foss v. Cummings*, 149 Illinois, 353 (affirmed 40 Ill. App. 523); *Lamson v. Bryden*, 160 Illinois, 613; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Pacific Factor Co. v. Adler*, 90 California, 110; *Raymond v. Leavitt*, 46 Michigan, 447; *Sampson v. Shaw*, 101 Massachusetts, 145; *Samuels v. Oliver*, 130 Illinois, 73; *Wells v. McGeoch*, 71 Wisconsin, 196; *Wright v. Crabbs*, 78 Indiana, 487.

Any conspiracy, although not technically a "corner" but having as its object the arbitrary increase or depression of prices, is in restraint of trade. *Central Salt Co. v. Guthrie*, 35 Oh. St. 666; *Craft v. McConoughy*, 79 Illinois, 346; *India Bagging Association v. Kock*, 14 La. Ann. 168; *King v. Norris*, 2d Ld. Kenyon, 300; *Leonard v. Poole*, 114 N. Y. 371; *People v. Goslin*, 73 N. Y. Supp. 520; *People v. Milk Exchange*, 145 N. Y. 267; *People v. North* [529] *River Sugar Co.*, 54 Hun, 354; *People v. Sheldon*, 139 N. Y. 251.

The rule to be extracted from all those cases is that any combination whose object is the enhancement of prices by virtue of combined effort is in restraint of trade and illegal.

The numerous cases in this court have held that combinations (a) to fix rates for railway transportation, (b) to determine the prices to be bid for pipe in public competition, (c) to sell tiles at a fixed price to non-members of the combination, (d) to combine railroads in one management through a holding company, (e) to bid the same prices for fresh meats, (f) to boycott dealers in one State who purchased from a factory in another State, (g) to secure control of the petroleum trade by stock ownership, (h) to acquire the tobacco industry, and (i) to control even intrastate terminal facilities where the effect was to give control over the access to the city from other States, are

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in restraint of interstate trade, because their object or necessary effect was (1) to suppress competition between those engaged in interstate commerce, (2) to enhance the prices of articles of such commerce, (3) to burden the free transaction of such commerce by one engaged therein, or (4) to control some part of such commerce. *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Loewe v. Lawlor*, 208 U. S. 274; *Montague & Co. v. Lowry*, 193 U. S. 38; *Northern Securities Co. v. United States*, 193 U. S. 197; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Standard Oil Co. v. United States*, 221 U. S. 1; *Swift & Co. v. United States*, 196 U. S. 375; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. Joint Traffic Ass'n*, 171 U. S. 505; *United States v. St. Louis Terminal*, 224 U. S. 383; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290.

A corner in cotton, which is a common object of interstate commerce and is produced in many States, is [530] clearly in restraint of trade because it interferes with the free flow of such commerce. *Montague & Co. v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375, 398, 399; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 434; *United States v. St. Louis Terminal*, 224 U. S. 383, 397, 405; *Gibbs v. McNeeley*, 118 Fed. Rep. 120, 126.

The temporary and feverish stimulation of competition by the corner does not prevent it from being in restraint of trade, as *Montague & Co. v. Lowry* and *United States v. St. Louis Terminal*, each illustrates an increase of competition incident to a combination in restraint of trade.

In response to the suggestion that the effect of a corner on interstate commerce is only indirect and incidental, we submit that the only cases wherein it has been held that the contract or combination attacked was not in violation of the Sherman Act because its effect on interstate commerce was only incidental or indirect were *United States v. E. O. Knight Co.*, 156 U. S. 1 (so explained and limited in the *Trans-Missouri*, *Addyston Pipe*, *Northern Securities*, *Swift & Co.*, *Danbury Hatters*, *Standard Oil*, and *American Tobacco* cases as to be of little value as authority),

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Hopkins v. United States, 171 U. S. 578; (as explained in the *Addyston Pipe, Montague, and Swift & Co. cases*), *Anderson v. United States*, 171 U. S. 604; and *Cincinnati Packet Co. v. Bay*, 200 U. S. 179. Obviously those decisions that fixing charges for local commission merchants and keeping out of business for five years in connection with the sale of property, were not in violation of the Sherman Act because of their purely indirect effect on interstate commerce are no precedents for holding that a corner in cotton affects interstate commerce only indirectly.

The lower court determined the meaning of the language used in the indictment, to wit, what acts are charged against the defendants, and such interpretation is conclusive upon this court. *United States v. Keitel*, 211 U. S. [531] 370; *United States v. Biggs*, 211 U. S. 507. But under the Criminal Appeals Act this court has the right to determine whether the facts so alleged in the indictment constitute a violation of the Sherman Anti-Trust Act. *United States v. Heine*, 218 U. S. 532, 540; *S. C.*, 218 U. S. 550; *United States v. Bitty*, 208 U. S. 393.

Mr. George P. Merrick, with whom Mr. William E. Church was on the brief, for defendant in error Patten:

The argument of the Government is not confined to the allegations of the indictment. Black's Dictionary, 271; *Foss v. Cummings*, 149 Illinois, 358; *Samuels v. Oliver*, 130 Illinois, 73; *Wells v. McGeough*, 71 Wisconsin, 196.

The only effect of the Government's resort to the statement of overt acts is to accentuate essential defects of the indictment. That statement can not, in law, and does not in fact, aid the indictment. *Pettibone v. United States*, 148 U. S. 197; *Smith v. United States*, 157 Fed. Rep. 721; *United States v. Patterson*, 55 Fed. Rep. 639; *United States v. Britton*, 108 U. S. 199.

Whatever restraint upon interstate commerce might result from acts charged, would be but indirect, remote, and incidental. The statute only condemns acts having direct and immediate effect. *Addyston Pipe Co. v. United States*, 175 U. S. 211; *Aikens v. Wisconsin*, 195 U. S. 194; *Ander-*

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son v. United States, 171 U. S. 604; *Bigelow v. Calumet & H. M. Co.*, 167 Fed. Rep. 721; *Cincinnati P. Co. v. Bay*, 200 U. S. 179; *Continental W. Co. v. Vaight & Sons*, 212 U. S. 227; *Field v. Barber Asphalt Co.*, 194 U. S. 618; *Hopkins v. United States*, 171 U. S. 578; *Loewe v. Lawlor*, 208 U. S. 274; *Montague v. Lowry*, 198 U. S. 38; *Northern Securities Co. v. United States*, 193 U. S. 197; *Oklahoma v. Kansas N. G. Co.*, 221 U. S. 229; *Standard Oil Co. v. United States*, 221 U. S. 1; *Swift & Co. v. United States*, 166 U. S. 375; *United States v. E. C. Knight & Co.*, 156 U. S. 1; *United States v. Joint T. Ass'n*, 171 U. S. 509; [582] *United States v. Trans-Mo. Freight Ass'n*, 166 U. S. 290; *United States v. Union P. R. R. Co.*, 188 Fed. Rep. 102; *United States v. St. Louis Terminal*, 224 U. S. 363; *Washington & G. R. R. Co. v. Hickey*, 166 U. S. 521.

This court has no jurisdiction to review the judgment of the Circuit Court because that judgment was not based upon a construction by it of the Anti-Trust Act, but upon repeated constructions thereof by this court. Even if technically this court has jurisdiction, it will not exercise it merely for the purpose of reaffirming propositions already settled by it. *Davies v. Slidell*, 154 U. S. 625; *Equitable Life Ass'n Soc'y v. Brown*, 187 U. S. 308; *Leonard v. V. S. R. R. Co.*, 198 U. S. 416; *United States v. Biggs*, 211 U. S. 507; *United States v. Bitty*, 208 U. S. 393; *United States v. Heinze*, 218 U. S. 532; *United States v. Keitel*, 211 U. S. 370; *United States v. Mescall*, 215 U. S. 26.

Mr. John C. Spooner, with whom Mr. Joseph P. Colton, jr., and Mr. George Rublee were on the brief for defendants in error, *Scales et al.*:

Under the Criminal Appeals Act the court may only review the construction of the Sherman Act by the Circuit Court. *United States v. Biggs*, 211 U. S. 507; *United States v. Keitel*, 211 U. S. 370.

In sustaining the demurrer to the seventh count the Circuit Court did not wrongly construe the Sherman Act. That count does not charge a direct interference with interstate commerce. *Ware & Leland v. Mobile*, 209 U. S. 405;

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Addyston Pipe & Steel Co. v. United States, 175 U. S. 211; *Anderson v. United States*, 171 U. S. 604; *Hopkins v. United States*, 171 U. S. 578; *Northern Securities Co. v. United States*, 193 U. S. 197; *Standard Oil Co. v. United States*, 221 U. S. 65; *United States v. Joint Traffic Association*, 171 U. S. 505; *United States v. E. C. Knight Co.*, 156 U. S. 1.

[533] The purchase of future contracts is not unlawful. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236.

No violation of any law except the Anti-Trust Act is charged. *Anderson v. United States*, 171 U. S. 615; *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454, 457.

In sustaining the demurrer to the third count the Circuit Court did not wrongly construe the Sherman Act. *Harri-man v. Northern Securities Co.*, 197 U. S. 291; *United States v. American Tobacco Co.*, 164 Fed. Rep. 712.

The *Northern Securities Case* and the *Tobacco Case* can be distinguished.

The Sherman Act is not an instrument by which a district attorney can arbitrarily curb the amount of profit which an individual can make in buying and selling commodities, or even in speculating on an exchange—merely by an allegation (not susceptible of definite proof) which he inserts in an indictment, that it will have certain effects on interstate commerce.

The seventh count does not charge monopoly or combination with regard to the sale of cotton.

The ground of the illegality of corners is that they are gaming contracts.

The prosecutor avoids the fundamental question whether the conspiracy described would directly restrain interstate commerce.

The restraint of trade charged is indirect by reason of the intervention of voluntary acts of independent human agents. See the "Squib" Case, reported as *Scott v. Shepherd*, 2 Blackstone, 892.

If the Government's contention that count seven sets forth an offense under the Sherman Act, then every general strike of workmen is condemned by that statute. Certainly no such result was contemplated by the framers of the statute,

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and no such doctrine was announced in *Loewe v. Lawlor*, where the act complained of was an [534] immediate interference with a manufacturer's trade; where defendants physically obstructed the liberty of the plaintiff to trade in interstate commerce.

The corner count does not charge any combination to withhold cotton from sale. The circuit court's construction of the indictment in that regard is conclusive. *United States v. Biggs*, 211 U. S. 507; *United States v. Keitel*, 211 U. S. 370.

A defective charge of conspiracy can not be aided by averments of overt acts. *Commonwealth v. Hunt*, 4 Met. 111; *Commonwealth v. Shedd*, 7 Cush. 514; *Conrad v. United States*, 127 Fed. Rep. 798; *McConkey v. United States*, 171 Fed. Rep. 829; *McKenna v. United States*, 127 Fed. Rep. 88; *Pettibone v. United States*, 148 U. S. 197; *Smith v. United States*, 157 Fed. Rep. 721; *United States v. Britton*, 108 U. S. 199; *United States v. MacAndrews*, 149 Fed. Rep. 823; *United States v. Milner*, 36 Fed. Rep. 890; *United States v. Patterson*, 55 Fed. Rep. 605.

The court has no jurisdiction to review the judgment of the circuit court.

Mr. Justice VAN DEVANTER delivered the opinion of the court.

This is a criminal prosecution under the Anti-Trust Act of July 2, 1890, 26 Stat. 209, c. 647, the indictment being in eight counts. In the circuit court demurrers to the third, fourth, seventh, and eighth counts were sustained and those counts dismissed, 187 Fed. Rep. 664, whereupon the Government sued out this writ of error under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246, c. 2564. The case has been twice orally argued.

At the second argument the Government expressly abandoned the third and fourth counts and challenged only the ruling upon counts seven and eight. Thus, the [535] propriety of the ruling upon the first two need not be considered.

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In passing upon the demurrers the circuit court proceeded first to construe the counts; that is, to ascertain with what acts the defendants are charged, and next to consider whether those acts are denounced as criminal by the Anti-Trust Act, the conclusion being that they are not.

The limitations upon our jurisdiction under the Criminal Appeals Act* are such that we must accept the circuit court's construction of the counts and consider only whether its decision that the acts charged are not condemned as criminal by the Anti-Trust Act is based upon an erroneous construction of that statute.

At the outset we are confronted with the contention that the decision is not based upon a construction of the statute. But to this we can not assent. The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

Each of the counts in question charges the defendants and others with engaging in a conspiracy "in restraint of and to restrain," by the method therein described, "trade and commerce among the several States" in the supply of cotton available during the year ending September 1, 1910, such supply consisting of all the cotton grown in the [536] Southern States in that year and the cotton left over from prior years. The counts are long, and the acts which the circuit court treated as charged in them are indicated by the following excerpt from its opinion, the footnotes being ours:

*The act is set forth in full in 211 U. S. at page 398, and rulings thereunder are found in *United States v. Bitty*, 208 U. S. 393, 399; *United States v. Kettel*, 211 U. S. 370, 398; *United States v. Biggs*, 211 U. S. 507, 518; *United States v. Mason*, 218 U. S. 115, 122; *United States v. Mescoff*, 215 U. S. 26, 31; *United States v. Stevenson*, 215 U. S. 199, 195; *United States v. Holmes*, 218 U. S. 532, 540; *United States v. Heinze*, No. 2, 218 U. S. 547, 550; *United States v. Kiesel*, 218 U. S. 601, 606; *United States v. Miller*, 223 U. S. 599, 602.

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"These counts are alike, with the exception of the statement of overt acts,* and each may be, broadly speaking, divided into three parts, which may be thus summarized:

"(1) The charging part contains a general charge of conspiracy in restraint of interstate commerce, with the usual formal and jurisdictional averments.

"(2) The second part contains a 'description of the trade and commerce to be restrained.' Under this head it is stated, in substance, that cotton is an article of necessity raised in the Southern States, which moves in large volume in interstate and foreign commerce, and that it is bought and sold upon the New York Cotton Exchange to such an extent as to practically regulate prices elsewhere in the country, so that future sales by speculators upon such exchange of more than the amount of cotton available at the time of delivery would create an abnormal demand and resultant excessive prices in all cotton markets.^b

* One count contained a statement of overt acts, while the other contained no such statement, a difference not here material.

^b In order that the brief summary and analysis of the third part may be better understood, the second part is here reproduced:

"DESCRIPTION OF TRADE AND COMMERCE TO BE RESTRAINED.

"And the grand jurors aforesaid, upon their oath aforesaid, do further present that for many years past cotton has been grown, one crop a year, in divers of the States of the United States, among others, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Kentucky, Louisiana, Oklahoma, Texas, Arkansas, Missouri, and New Mexico; that such cotton has been and is an article of prime necessity to the people of the United States; and the growing and the spinning and manufacturing of the same into yarns and fabrics have necessitated the cultivation of many millions of acres of land in the States last aforesaid and the employment of many thousands of persons, in those States and in other States of the United States, in connection with the planting, cultivating, picking, ginning, compressing, storing, selling, shipping, and transporting of such cotton; that about sixty per cent of the cotton so grown has been shipped to and consumed in foreign countries in each crop year; that of the remaining forty per cent of such cotton about one half has been spun into yarns and manufactured into cotton fabrics by spinners and manufacturers in said Southern States for the use of the people of the United States and foreign countries, and the other half has been shipped to Northern States of the United States, among others, Massachusetts, Rhode Island, New York, Pennsylvania, New Hampshire, Maine, Connecticut, Maryland, New Jersey, and Delaware, in pursuance of sales of the same to spinners and manufacturers in the last-mentioned States, and there spun into yarns and

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[537] "(3) The third part contains a 'description of the method devised and adopted by the conspirators for re[538]straining the trade and commerce.' It is alleged, at the outset, that the conspirators were to restrain trade and commerce by doing 'what is commonly called running a corner in cotton.' Averments then follow showing how the corner was to be brought about and its effect, which may be thus analyzed:

"(1) The conspirators were to make purchases from speculators upon the New York Cotton Exchange of quantities of cotton for

manufactured into fabrics for the use of the people of the United States and foreign countries; that the demand for such cotton in foreign countries and in said Northern and Southern States has been steady and continuous throughout all portions of each crop year; that in the ordinary course of business said spinners and manufacturers have bought little or no cotton beyond that required by them for their immediate needs; that such cotton has been extensively bought and sold upon the Cotton Exchange in said city of New York for future delivery in the United States during current crop years, so much so that cotton bought and sold elsewhere in the United States than on that exchange has customarily been bought and sold at prices corresponding to the prices prevailing upon said exchange; that although, as the grand jurors aforesaid, upon their oath aforesaid, charge the fact to be, the rules of said Cotton Exchange at New York City have required that all sellers and purchasers of cotton upon that exchange for future delivery should contemplate the actual delivery and receipt of cotton sold and purchased by them there, it has been possible for more cotton to be sold at a given time or at given times upon said exchange for future delivery at a given time or given times during a current crop year by speculators, that is to say, persons not having any cotton in their possession, than would be in existence at such future time or times and available to such speculators for acquisition and delivery to the purchasers thereof; that under such circumstances it has been necessary for such sellers of cotton upon said exchange for such future delivery to make settlements with purchasers in cash or its equivalent, at the prices prevailing upon said exchange at the time or times such settlements have been made, as to whatever cotton such sellers were unable to acquire and deliver to such purchasers when such delivery was due; that the artificial condition produced by such excessive purchases, when made, has invariably created such an abnormal demand for cotton on the part of such sellers that very excessive prices therefor have prevailed upon said exchange, and upon all other exchanges and in all cotton markets, until after such settlements have been made, so that bona fide purchasers of cotton for consumption in spinning and manufacturing have been compelled for a time to pay the same excessive prices in order to obtain cotton for their needs; that the cotton crop for the

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future delivery greatly in excess of the amount available for delivery when deliveries should become due.^a

[589] "(2) By these means an abnormal demand was to be created on the part of such sellers who would pay excessive prices to obtain cotton for delivery upon their contracts.

"(3) The excessive prices prevailing upon the New York Exchange would cause similar prices to exist upon other cotton markets.

"(4) 'As a necessary and unavoidable result of their acts, said conspirators were to compel' cotton manufacturers throughout the country to pay said excessive prices to obtain cotton for their needs or else curtail their operations.

"(5) And also, as 'a necessary and unavoidable result' of said acts, an unlawful obstruction would be put upon interstate trade and commerce.^b

"The offence charged, then, is a conspiracy in restraint of trade through the operation of a 'corner,' * * *."

Although ruling that there was no allegation of a specific intent to obstruct interstate trade or commerce and that the raising of prices in markets other than the Cotton Exchange in New York was "in itself no part of the scheme," the court assumed that the conspirators intended "the necessary and unavoidable consequences of their acts," and observed that "prices of cotton are so correlated that it may

crop year beginning September 1, 1909, and ending September 1, 1910, approximated ten million and five hundred thousand bales; that about two hundred and sixty-five thousand bales of cotton were left over and available at the beginning of said crop year of the crops of prior crop years; that the foregoing allegations of this paragraph of this count of this indictment apply to the cotton of said crop year and to that of prior crop years; and that each of said conspirators, when so conspiring as in this count of this indictment set forth, well knew all the premises in this count aforesaid."

^a The language of the charge is: "They were to make purchases from day to day upon said Cotton Exchange at New York City, from speculators, of quantities of cotton for future delivery at different times during said crop year greatly in excess of the amount of cotton which would be in existence and available for delivery to them by the sellers thereof when such deliveries were due, reference being had to the usages and requirements of said trade and commerce which are in this count above set forth."

^b Of these allegations the court said in its opinion: "We must also assume that the allegations of the results to follow the conspiracy are more than the conclusions or economic theories of the pleader and amount to allegations of fact."

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be said that the direct result of the acts of the conspirators was to be the raising of the price of cotton throughout the country."

Upon the second argument the defendants contended, and counsel for the Government expressly conceded, that "running a corner" consists, broadly speaking, in acquiring control of all or the dominant portion of a commodity with the purpose of artificially enhancing the price, "one of the important features of which," to use the [540] language of the Government's brief, "is the purchase for future delivery, coupled with a withholding from sale for a limited time"; and as this definition is in substantial accord with that given by lexicographers and juridical writers, we accept it for present purposes, although observing that not improbably in actual usage the expression includes modified modes of attaining substantially the same end.

Whilst thus agreeing upon what constitutes running a corner, the parties widely differ as to whether what is so styled in this instance contained the elements necessary to make it operative. The point of difference is the presence or absence of an adequate allegation that the purchasing for future delivery was to be coupled with a withholding from sale, without which, it is conceded by both parties, the market could not be cornered. But the solution of the point turns upon the right construction of the counts, and that, as has been indicated, is not within our province on this writ of error. We must assume that the counts adequately allege whatever the circuit court treated them as alleging. Its opinion given at the time, although not containing any express ruling upon the point of difference, shows that the counts were treated as alleging an operative scheme, one by which the market could be cornered. The court spoke of it as "contrary to public policy," as "arbitrarily controlling the price of a commodity," and as "positively unlawful in any State having a statute against corners." Evidently, it was assumed that every element of running a corner was present. We accordingly indulge that assumption, but leave the parties free to present the question to the district court for its decision in the course of such further proceedings as may be had in that court.

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We come, then, to the question, whether a conspiracy to run a corner in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the States, and thereby to enhance [541] artificially its price throughout the country and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of § 1 of the Anti-Trust Act, which makes it a criminal offense to "engage in" a "conspiracy in restraint of trade or commerce among the several States." The circuit court, as we have seen, answered the question in the negative; and this, although accepting as an allegation of fact, rather than as a mere economic theory of the pleader, the statement in the counts that interstate trade and commerce would necessarily be obstructed by the operation of the conspiracy. The reasons assigned for the ruling, and now pressed upon our attention, are (1) that the conspiracy does not belong to the class in which the members are engaged in interstate trade or commerce and agree to suppress competition among themselves, (2) that running a corner, instead of restraining competition, tends, temporarily at least, to stimulate it, and (3) that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not to be a restraint in the sense of the statute.

Upon careful reflection we are constrained to hold that the reasons given do not sustain the ruling and that the answer to the question must be in the affirmative.

Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein. *Loewe v. Lawlor*, 208 U. S. 274, 293, 301. As was said of this section in *Standard Oil Co. v. United States*, 212 U. S. 1, 59:

[542] "The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of

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trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense."

It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Of course, the statute does not apply where the trade or commerce affected is purely intrastate. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests in the present case when its salient features are kept in view.

It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton, a product of the Southern States, largely used and consumed in the Northern States. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern States. The corner was to be conducted on the Cotton Exchange in New York City, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy [543] upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

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Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-Trust Act is designed to prevent. See *Swift & Co. v. United States*, 196 U. S. 375, 396-400; *Loewe v. Lawlor*, 208 U. S. 274; *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106. And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts and can not be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243; *United States v. Reading Co.*, 226 U. S. 324, 370.

The defendants place some reliance upon *Ware & Leland v. Mobile County*, 209 U. S. 405, as showing that the operation of the conspiracy did not involve interstate trade or commerce, but we think the case does not go so far and is not in point. It presented only the question of the effect upon interstate trade or commerce of the taxing by a State of the business of a broker who was dealing [544] in contracts for the future delivery of cotton, where there was no obligation to ship from one State to another; while here we are concerned with a conspiracy which was to reach and bring within its dominating influence the entire cotton trade of the country and which was to be executed, in part only, through contracts for future delivery. It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *Montague & Co. v. Lowry*, 193 U. S. 38, 45-46; *Swift & Co. v. United States*, 196 U. S. 375, 386-387.

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As we are of opinion that the statute does embrace the conspiracy which the Circuit Court treated as charged in counts seven and eight; as construed by it, its judgment upon those counts is reversed and the case is remanded for further proceedings in conformity with this opinion.

Reversed in part.

Mr. Justice LUTTON, dissenting.

The majority seem to base a judgment of reversal upon the assumption that the court below interpreted the counts in question as charging all the elements essential to a technical "corner." To this view of the opinion of the court below I do not assent. As I interpret that opinion the court held the count bad because it did not charge a "corner." Thus interpreted there was no error in quashing the count. I am authorized to say that the Chief Justice concurs in this dissent.

Mr. Justice HOLMES also dissents.

GOMPEERS v. BUCKS STOVE & RANGE COMPANY.*

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(No. 372. Argued January 27, 30, 1911—Decided May 15, 1911.)

[221 U. S. 418.]

An order of a court of equity, restraining defendants from boycotting complainant by publishing statements that complainant was guilty of unfair trade, does not amount to an unconstitutional abridgment of free speech; the question of the validity of the order involves only the power of the court to enjoin the boycott.^b

Quere as to what constitutes a boycott that may be enjoined by a court of equity; but, in order that it may be enjoined, it must

* For criminal contempt proceedings (283 U. S. 604), see *post*, page 792.

^b Syllabus and statements of arguments copyrighted, 1911, by The Banks Law Publishing Company.

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appear that there is a conspiracy causing irreparable damage to complainant's business or property.

Where conditions exist that justify the enjoining of a boycott, the publication and use of letters, circulars, and printed matter may constitute the means of unlawfully continuing the boycott and amount to a violation of the order of injunction.

The Anti-Trust Act of 1890 applies to any unlawful combination resulting in restraint of interstate commerce, including boycotts and blacklisting, whether made effective by acts, words, or printed matter. *Loewe v. Lawlor*, 208 U. S. 274.

The court's protective powers extend to every device whereby property is irreparably damaged or interstate commerce restrained; otherwise the Anti-Trust Act would be rendered impotent.

Society itself is an organization and does not object to organizations for social, religious, business, and all other legal purposes.

On appeal against unlawfully exercising power of organizations it is the duty of government to protect the one against the many as well as the many against the one.

An agreement to act in concert on publication of a signal makes the words used as the signal amount to verbal acts, and, when the facts justify it, the court having jurisdiction can enjoin the use of the words in such connection; and so held as to words "unfair" and "we don't patronize" as used in this case for the purpose of continuing a boycott.

Civil and criminal contempts are essentially different and are governed by different rules of procedure.

A proceeding instituted by an aggrieved party to punish the other [419] party for contempt for affirmatively violating an injunction in the same action in which the injunction order was issued, and praying for damages and costs, is a civil proceeding in contempt, and is part of the main action, and the court can not punish the contempt by imprisonment for a definite term; the only punishment is by fine measured by the pecuniary injury sustained.

In criminal proceedings for contempt the party against whom the proceedings are instituted is entitled to the protection of the constitutional provisions against self-incrimination.

There is a substantial variance between the procedure adopted and punishment imposed, when a punitive sentence appropriate only to a proceeding for criminal contempt is imposed in a proceeding in an equity action for the remedial relief of an injured party.

Where the main suit in which an injunction order has been granted is settled and discontinued, every proceeding which is a part thereof, or dependent thereon, is also necessarily settled as between the parties; and so held as to a proceeding instituted by the party aggrieved against the other party for violation of an injunction.

The fact that the party aggrieved by the violation of an injunction deprives himself, by settling the main case, of the right to pursue

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the violator for contempt does not prevent the court, whose order was violated, from instituting proceedings to vindicate its authority; and in this case the dismissal of the civil contempt proceeding is without prejudice to the power and right of the court whose injunction was violated to punish for contempt by proper proceedings. 33 App. D. C. 518, reversed.

[57 L. Ed. 797.*]

[INJUNCTION—AGAINST BOYCOTT—VERBAL ACTS.—A court of equity may enjoin the continuance of a boycott, although spoken words or written matter were used as one of the instrumentalities by which the boycott was made effective.

For other cases, see Injunction, I d, in Digest Sup. Ct. 1908.

APPEAL—IN CONTEMPT PROCEEDING—REVERSIBLE ERROR—SENTENCE ON DEFECTIVE COUNT.—A decree adjudging each defendant guilty of the independent acts set out in separate paragraphs of a petition charging them with contempt of an injunction order, and consolidating sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance, should be reversed if it appears that the defendants have been sentenced on any charge which, in law or in fact, does not constitute a disobedience of the injunction.

For other cases, see Appeal and Error, VIII m, 2, in Digest Sup. Ct. 1908.

CONTEMPT—CIVIL OR CRIMINAL—PUNISHMENT.—A punitive sentence appropriate only to a proceeding at law for criminal contempt where the contempt consisted in doing that which had been prohibited by an injunction could not properly be imposed in contempt proceedings which were instituted, entitled, tried, and, up to the moment of sentence, treated as a part of the original cause in equity.

For other cases, see Contempt, II e, in Digest Sup. Ct. 1908.

CONTEMPT—EFFECT OF SETTLEMENT OF MAIN CAUSE—DISMISSAL.—A proceeding in equity for civil contempt consisting in doing that which was forbidden by an injunction, where the only remedial relief possible was a fine payable to the complainant, must be dismissed without prejudice to the power and right of the court granting the injunction to punish for contempt by proper proceedings, where there has been a complete settlement between the parties of all the matters involved in the original equity cause.]

*The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 57, page 797, Lawyers Edition, Supreme Court Reports. Syllabus copyrighted, 1912, 1913, by The Lawyers Co-operative Publishing Company.

Statement of the Case.

This is a proceeding to reverse a judgment, finding that Samuel Gompers, John Mitchell, and Frank Morrison were guilty of contempt in violating the terms of an injunction restraining them from continuing a boycott, or from publishing any statement that there was or had been a boycott against the Bucks Stove & Range Company. The contempt case grew out of litigation reported in 38 App. D. C. 83, 516. It will only be necessary to briefly refer to the facts set out in that record.

The American Federation of Labor is composed of voluntary associations of labor unions with a large membership. It publishes the American Federationist, which has a wide circulation among the public and the Federa[420]tion. Samuel Gompers is president and editor of the paper. John Mitchell is vice president of the Federation and president of the United Mine Workers, one of the affiliated unions. Frank Morrison has charge of the circulation of the paper. The Federation had a difference as to the hours of labor with the Bucks Stove & Range Company, of which J. W. Van Cleave was president, who was also president of the American Manufacturers' Association. This controversy over the hours of work resulted in a boycott being declared against the Bucks Stove & Range Company, and it was thereupon declared "Unfair" and was published in the American Federationist on the "Unfair" and "We don't patronize" lists. The company filed in the Supreme Court of the District of Columbia its bill against the Federation, the defendants above named and other officers, alleging that the defendants had entered into a conspiracy to restrain the company's State and interstate business, in pursuance of which they had boycotted it, published it on the unfair lists, and had by threats also coerced merchants and others to refrain from buying Bucks' products for fear that they themselves would be boycotted if they continued to deal with that company. The result of the boycott had been to prevent persons from dealing with it and had greatly lessened its business and caused irreparable damage.

After a lengthy hearing, the court, on December 18, 1907, signed a temporary injunction, which became effective when

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the bond required was given, on December the 23d. The order is published in the margin.*

[421] Thereafter testimony was regularly taken, and on March 23, 1908, the injunction was made permanent, with provisions almost identical with the temporary order of December 17, 1907.

From this final decree the defendants appealed, but before a decision was had the Bucks Stove & Range Company began contempt proceedings by filing in the Supreme Court of the District a petition entitled "Bucks

* Ordered that the American Federation of Labor, Samuel Gompers, Frank Morrison, * * * John Mitchell, * * * their and each of their agents, servants, attorneys, confederates, and any and all persons acting in aid of or in conjunction with them or any of them be, and they hereby are, restrained and enjoined until the final decree in said cause from conspiring, agreeing, or combining in any manner to restrain, obstruct, or destroy the business of the complainant, or to prevent the complainant from carrying on the same without interference from them or any of them, and from interfering in any manner with the sale of the product of the complainant's factory or business by defendants, or by any other person, firm, or corporation, and from declaring or threatening any boycott against the complainant, or its business, or the product of its factory, or against any person, firm, or corporation engaged in handling or selling the said product, and from abetting, aiding, or assisting in any such boycott, and from printing, issuing, publishing, or distributing through the mails, or in any other manner, any copies or copy of the American Federationist, or any other printed or written newspaper, magazine, circular, letter, or other document or instrument whatsoever, which shall contain or in any manner refer to the name of the complainant, its business, or its product in the "We don't patronize," or the "Unfair" list of the defendants, or any of them, their agents, servants, attorneys, confederates, or other person or persons acting in aid of or in conjunction with them, or which contains any reference to the complainant, its business, or product in connection with the term "Unfair" or with the "We don't patronize" list or with any other phrase, word, or words of similar import, and from publishing or otherwise circulating, whether in writing or orally, any statement or notice of any kind or character whatsoever, calling attention to the complainant's customers, or of dealers or tradesmen, or the public to any boycott against the complainant, its business, or its product, or that the same are, or were, or have been declared to be "unfair," or that it should not be purchased or dealt in or handled by any dealer, tradesman, or other person whomsoever, or by the public,

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Stove & Range Company, plaintiff, vs. The American Federation of Labor *et al.*, defendants, No. 27,305, Equity," alleging that petitioner had "filed in this cause its original bill of complaint, naming as defendants, among others, Samuel Gompers, Frank Morrison, and John Mitchell." All of the record and testimony in the original cause was made a part of the petition, as follows:

"Reference is hereby made to the original bill and exhibits filed in support of the same, the answer and amended answer of the defendants, the testimony taken on both sides,

or any representation or statement of like effect and import, for the purpose of, or tending to, any injury to or interference with the complainant's business, or with the free and unrestricted sale of its product, or of coercing or inducing any dealer, person, firm, or corporation, or the public, not to purchase, use, buy, trade in, deal in, or have in possession stoves, ranges, heating apparatus, or other product of the complainant, and from threatening or intimidating any person or persons whomsoever from buying, selling, or otherwise dealing in the complainant's product, either directly or through orders, directions, or suggestions to committees, associations, officers, agents, or others, for the performance of any such acts or threats as herein above specified, and from in any manner whatsoever impeding, obstructing, interfering with or restraining the complainant's business, trade, or commerce, whether in the State of Missouri or in other States and Territories of the United States, or elsewhere wheresoever, and from soliciting, directing, aiding, assisting, or abetting any person or persons, company, or corporation to do or cause to be done any of the acts or things aforesaid.

And it is further ordered by the court that this order shall be in full force, obligatory and binding upon the said defendants and each of them and their said officers, members, agents, servants, attorneys, confederates, and all persons acting in aid of or in conjunction with them, upon the service of a copy thereof upon them or their solicitors or solicitor of record in this cause: *Provided*, The complainant shall first execute and file in this cause, with a surety or sureties to be approved by the court, or one of the justices thereof, an undertaking to make good to the defendants all damage by them suffered or sustained by reason of wrongfully and inequitably suing out this injunction, and stipulating that the damages may be ascertained in such manner as the justice of this court shall direct, and that, on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

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the original order restraining and enjoining the defendants *pendente lite*, and the final decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this [423] petition, and it is prayed that the same may be taken and read as a part hereof at any and all hearings upon this petition, whether in this court or on appeal from its decision herein rendered."

Some of the publications were charged to be in violation of the terms of the temporary injunction, dated December 23, 1907, and others were alleged to be in violation of the final decree, dated March 23, 1908.

The petition set out in nine distinct paragraphs the speeches, editorials, and publications made at different times by the several defendants, charging that in each instance they continued and were intended to continue the boycott, and to republish the fact that the complainant was or had been on the "unfair list." It concluded by alleging that by the devices, means, speeches, and publications set forth, and in contempt of court, the defendants had disobeyed its orders and violated the injunction. The prayer was (1) that the defendants be required to show cause why they should not be attached for contempt and adjudged by the court to be in contempt of its order and its decree in this cause and be punished for the same. (2) And that petitioner may have such other and further relief as the nature of its case may require. (Signed: Bucks Stove & Range Company, by J. W. Van Cleave, president.) It was also sworn to by the president of the company and signed by its solicitors.

A rule to show cause issued, requiring each of the defendants to show cause why they should not be adjudged to be in contempt and be punished for the same. Each of the defendants answered under oath, and, as treating the contempt proceeding as a part of the original cause, admitted the allegations as to the history of the litigation in paragraphs 2, 3, 4, and 5 of the petition, but "for greater accuracy refer to the record in this cause." Publications were admitted but explained. Each of the defendants denied under oath that he had been in disregard or [424] contempt of the court's

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order and denied that any of the acts and charges complained of constituted a violation of the order. There were several issues of fact on which much evidence was taken. This related to the question of intent, and whether there had been a purpose and plan to evade any injunction which might be granted. There was also an issue as to whether John Mitchell had put a resolution to the convention of the United Mine Workers; whether Samuel Gompers and Frank Morrison had rushed the mailing of the January issue of the American Federationist, on December 22, so as to avoid the injunction dated December 17, which became operative on giving bond by complainant on December 23; and also whether they had thereafter sold and circulated copies of this issue containing the Bucks Stove Company on the "Unfair" and "We don't patronize" list. Evidence was taken partly by deposition, partly before an examiner in chancery.

Each of the defendants was called as a witness by the complainant, and each testified as to facts on which the allegation of intent or evasion was based, and as to the publications, speeches, and resolutions which he was accused of having made, and which the petition alleged constituted an act of disobedience and contempt of court.

The court made a special finding as to two of the nine charges, and then found that all three of the defendants were guilty of the several acts charged in paragraphs 17 and 26; that respondents Gompers and Morrison were guilty of the several acts charged in the sixteenth and twentieth paragraphs; that respondent Morrison was guilty of the acts charged in the twenty-fifth paragraph; and that respondent Gompers was guilty of the several acts charged in the paragraphs 19, 21, 22, and 23. The finding concluded: "The court being fully advised in the premises, it is by it, this twenty-third day of December, A. D. 1908, considered that the said respondents, Samuel [425] Gompers, Frank Morrison, and John Mitchell, are guilty of contempt in their said disobedience of the plain mandates of the said injunctions; and it is therefore ordered and adjudged that the said respondent, Frank Morrison, be confined and imprisoned

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in the United States jail in the District of Columbia; for and during a period of six months; that the said respondent, John Mitchell, be confined and imprisoned in the said jail for and during a period of nine months; and that the respondent, Samuel Gompers, be confined and imprisoned in the said jail for and during a period of twelve months, said imprisonment as to each of said respondents to take effect from and including the date of the arrival of said respective respondents at said jail."

On the same day the defendants entered an appeal, which was allowed, and bail fixed. After notice to the defendants the complainant moved "the court to amend or supplement its decree by awarding to it its costs against the defendants under the proceedings in contempt against them." This motion was granted in an order which recited that "upon consideration of the motion of complainant, filed in the above cause for award of its costs in the contempt proceedings in said cause against the defendants, Samuel Gompers, John Mitchell, and Frank Morrison, and after argument by the solicitors of the respective parties, the motion is granted, and it is ordered that the complainant, the Bucks Stove & Range Company, do recover against the defendants named its costs in the said contempt proceeding, to be taxed by the clerk, and that it have execution therefor as at law."

The parties also entered into a stipulation, the material portions of which are as follows:

"For the purpose of avoiding unnecessary cost in the matter of the appeal by the defendants, Samuel Gompers, John Mitchell, and Frank Morrison, from the judgment against them under the contempt proceedings in the above entitled cause, it is stipulated that, * * * with [426] the approval of the Court of Appeals, the record in the above cause [*Bucks Stove & Range Co. v. American Federation of Labor et al.*] * * * may be read from by either party to the appeal in said contempt proceedings, in so far as the same may be relevant and material, with like effect as if the said record of the original cause were embraced in the transcript, in the appeal from the said contempt proceedings."

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This stipulation was signed by counsel for the defendants and for the Bucks Stove & Range Co.

The petition in the contempt proceeding, the answer, orders, final decree, amended decree, and stipulation were all entitled in the original cause, "Bucks Stove & Range Company v. The American Federation of Labor, Samuel Gompers, John Mitchell, Frank Morrison, *et al.*" The appeal papers in the Court of Appeals of the District were, and those here on certiorari are, entitled "Samuel Gompers, John Mitchell, and Frank Morrison, appellants, v. The Bucks Stove & Range Company."

On December 23, 1908, the defendants were found guilty of contempt, and on the same day they appealed. On March 26, 1909, the Court of Appeals rendered its decision in favor of the Bucks Stove Company on the appeal from the decree of March 23, 1908, and found that the decree was, in some respect, erroneous, and modified it accordingly. From that decision both parties appealed to this court, the Bucks Stove Company contending that it was error to modify in any respect; the American Federation of Labor *et al.* contending that the Court of Appeals erred in not reversing and setting aside as a whole the decree granting the injunction.

There subsequently came on to be heard in the Court of Appeals of the District of Columbia the appeal from the decree in the contempt proceeding. On that hearing the Bucks Stove & Range Company moved to dismiss the appeal, because the evidence had not been incorporated [427] in a bill of exceptions, claiming that it was a criminal proceeding and was governed by the practice applicable to law cases. This motion was resisted by the defendants, who contended that the contempt proceedings were a part of the equity cause and that the case was to be governed by equity practice, in which the whole record could be examined on appeal.

The court of appeals held that the proceeding was for criminal contempt and that for want of a bill of exceptions it could not examine the testimony, but must treat the findings of fact by the judge as conclusive and limit its consideration to the question whether as a matter of law the

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petition charged and the finding found acts which amounted to a violation of the injunction. It held that some of the facts alleged did constitute a good charge of contempt, and as each of the defendants were found to be guilty of at least one of such acts of disobedience constituting a violation of the injunction and a contempt of court, it held that the conviction must be sustained. This ruling was put on the ground that on a general verdict of guilty, the conviction and sentence on an indictment containing several counts, some of which were bad, must stand, if those which were good would sustain the sentence. It therefore not only refused to examine the evidence to determine whether the proof was sufficient to sustain the conviction, but it also declined to consider the sufficiency of the other charges in the petition of which the defendants were also found guilty. It affirmed the judgment of the Supreme Court of the District. The defendants thereupon applied for and obtained a writ of certiorari.

The appeal and cross appeal in the original cause of the *Bucks Stove & Range Company v. The American Federation of Labor et al.* were heard here together. During the argument it appeared that the parties had settled their differences and, on the ground that the questions were moot, [428] this court dismissed both appeals. 219 U. S. 581. Following this disposition of those appeals, and on the same day, the contempt case was called, and was argued by counsel for the Bucks Stove & Range Company and counsel for Samuel Gompers, Frank Morrison, and John Mitchell.

Mr. Alton B. Parker for petitioner, with whom *Mr. Jackson H. Ralston*, *Mr. F. L. Siddons*, *Mr. W. E. Richardson*, and *Mr. John T. Walker* were on the brief, for plaintiff in error:

Proceedings for contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies

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to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the Government, the court, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature and the parties generally interested in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. *In re Nevitt*, 117 Fed. Rep. 448, 460, and cases cited.

This classification of, or distinction between, civil and criminal contempts was quoted with approval by this court in *Bessette v. W. B. Conkey Co.*, 194 U. S. 328. The court adds that it may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other, quoting approvingly from *In re Debs*, 158 U. S. 564.

The case at bar is clearly within the definitions of a [429] civil contempt as set forth in these controlling authorities. It was instituted by a petition made by the Bucks Stove & Range Company; was entitled in the action which had resulted in the order and decree which the petitioner claimed the defendants Gompers, Mitchell, and Morrison had disobeyed; asked that all the pleadings, testimony, and proceedings in the action be deemed incorporated in the petition and taken and read as a part thereof; prayed that the defendants be punished for a violation of the order and decree and that petitioner should have such other and further relief as the nature of its case may require. The petition was presented to the Supreme Court, sitting as a court of equity, before one of the justices thereof, acting as a chancellor; it was entitled in the equity cause and marked "In Equity"; it was conducted from its beginning to its conclusion according to equity rules; all the testimony was taken before examiners as in chancery practice; it was all taken down in writing and reported to the court; there was never an opportunity or occasion to except to any ruling of the court in the rejection or the admission of testimony; the hearing was had upon the testimony thus

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reported, and it was upon that testimony that the decree or judgment or sentence was based.

The courts below erred, therefore, in holding the proceeding to be one for the presentation of a criminal contempt, and hence a reversal should follow.

The Court of Appeals also fell into error in refusing to consider the evidence which the defendants contend shows that there was no violation of either the order or decree. The reason assigned by it for its action was that exceptions were necessary to bring up the record. But exceptions are neither necessary nor permissible according to the course and practice in equity, and, as we have seen, this was a proceeding in equity and conducted according to its rules from beginning to end by both court and counsel. Hence a reversal is required.

[430] If the court should conclude that it is nevertheless its duty to examine into the merits to see whether a different result would have been required, and examination be made by the Court of Appeals, we urge that the record does not disclose a violation of either the order or decree by these defendants. On the appeal from the final decree in the action the Court of Appeals held that certain provisions of the decree were in excess of the power of the court because it deprived the defendants of the constitutional guarantees of freedom of the press and of speech, and modified it accordingly. It is settled in this court that in a case or proceeding within its jurisdiction as to parties and subject-matter, if the court makes an order in excess of its power it is void. *Ex parte Rowland*, 104 U. S. 604; *Ex parte Harding*, 120 U. S. 782; *In re Ayres*, 123 U. S. 243; *Ex parte Terry*, 128 U. S. 289.

We urge that the provisions the court held to be void were so interwoven with the valid provisions that they cannot be separated without destroying the general scheme and purpose of the decree, and hence that the entire decree should be held to be void.

If, however, this position should not meet with the approval of the court, we claim that the conduct of the defendants must be tested by the decree as modified by the Court of Appeals and not as made by the trial court. Thus

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tested it will appear that these defendants did not offend against either the letter or spirit of the decree. It is true that the name of the Bucks Stove & Range Company did appear in the "We don't patronize" list of the American Federationist after the order was made forbidding it. But it also appears that this was before the date when the order became effective by its very terms. Certainly the defendants cannot be held to have violated the order before it became operative. Moreover, it should be noted that never after the order went into effect was such a publication made. None of the other publica[481]tions and speeches complained of offend against the decree as modified by the Court of Appeals.

If this court finds otherwise, the decrees of contempt should nevertheless be vacated because they embrace findings of which contempt was, but can not lawfully be predicated. It cannot be said that the learned justice did not base this unusual and excessive punishment in part upon these findings, for he says necessarily that he did when he presents them as a portion of the foundation of his sentence.

Mr. Daniel Davenport and Mr. J. J. Darlington for respondent:

The willful violation of an injunction by a party to a cause is a contempt of court constituting a specific criminal offense. *Bullock v. Westinghouse Co.*, 129 Fed. Rep. 107; *Ex parte Kearney*, 7 Wheat. 38, 42; *New Orleans v. Steamship Co.*, 20 Wall. 387, 392; *Hayes v. Fischer*, 102 U. S. 121.

The proceeding to punish for a contempt is in its nature a criminal proceeding, whether the result be only punishment of the party for the insult to the court, or whether a part of the punishment is by way of a fine payable to the party injured as compensation for the damages inflicted upon him by the contemptuous act. The fact that the punishment operates remedially does not alter the nature of the proceeding. Punishment for doing an act forbidden by the injunction is entirely different from punishment as a means of coercion to compel the doing of something commanded. The latter proceeding is, properly speaking,

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one for a civil contempt, the former one for a criminal contempt. The nature of the proceeding can readily be determined by an examination of the charge made. If it is for the doing of an act forbidden, it is clearly a criminal proceeding, and not one for a civil contempt. It is perfectly apparent from the allegations of [432] the complaint, the answers of the defendants, and the punishment the court inflicted, that the parties concerned all regarded the proceeding as one for the punishment of the accused for doing what they were commanded not to do. The prayer annexed to the complaint was that they be punished for their contempt. It is true that the complainant asked for such further relief as the court might allow as the nature of its case may require. Inasmuch as the thing complained of was an act forbidden to be done, the only relief possible was a fine payable to it as a part of the punishment for the contempt. Many cases sanctioned by this court approve of such joint punishment. *In re Christensen Engineering Co.*, 194 U. S. 458, and cases cited.

In a criminal proceeding to punish for a contempt for the violation of an injunction, no particular method is necessary to be pursued in bringing the matter to the attention of the court. Any sworn statement setting forth the facts is sufficient to authorize the court to proceed to investigate the charge. A rule to show cause why he should not be punished for his contempt is sufficient to bring him before the court, although an attachment may be granted in the first instance, where the case is urgent and the contempt flagrant. The trial may be had on answers, counter-affidavits, or some other form of pleading presented as a defense. The defendant must be given opportunity to make explanation or defense. The court may adopt such mode of trial as in its discretion it sees fit, in order to determine the fact of the contempt, provided due regard is had to the essential rules that obtain in the matter of contempts. Particular questions or issues, upon which to take testimony, may be referred to a referee, master, or other designated person. The accusations must be supported by evidence sufficient to convince the mind of the trier beyond a reasonable doubt of the actual guilt of the accused. If satisfied of

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the guilt of the [422] accused, the court can find him guilty and inflict the punishment either wholly by way of fine or imprisonment for the public offense, or partially for the benefit of the complainant. And, in such proceeding, it is perfectly proper and not unusual as a part of the punishment to award his costs to the complainant.

The record in this case shows that all these requirements of the law were duly observed and the rights of the accused properly safeguarded. The court properly found the accused guilty of contempt of its authority and sentenced them to jail. Although it might have done so in this proceeding, it did not, however, fine the defendants as a part of the punishment a sum payable to the complainant, except by way of costs.

Although the contempt consists in a violation of an injunction granted by a court of equity, since the proceeding for its punishment is one of law, review can be had only by writ of error and not by appeal, and, as in other law cases, a bill of exceptions is necessary to review any claimed error not otherwise apparent on the face of the record. *Continental Gin Co. v. Murray*, 162 Fed. Rep., 873.

Since there is no bill of exceptions here this court is confined therefore to a review of the sufficiency of the averments of the complaint, the answers, and the judgment of the court thereon. It can not undertake to determine the fact of guilt or innocence, nor undertake to review rulings on questions of evidence. But it can properly review the two questions about which there is serious controversy here: Was the original order of the injunction void for want of authority in the court to grant the injunction which was violated, and did the court exceed its authority in punishing them for its violation?

The injunction which the defendants violated was valid. It forbade the defendants to carry on a boycott against the complainant by any means whatever and particularly, [424] by putting its name on an unfair list, publishing it as unfair, sending out boycott circulars, or by any act whatever, verbal or otherwise, inciting others to engage in, or carry it on. This was a perfectly legitimate exercise of power by the court, frequently exercised by it, sanctioned

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by numerous precedents, and not interfering in the least with any legitimate use of speech or of the press.

That the boycott was illegal; that a person threatened with irreparable injury to his business or property by a boycott has the right to go into a court of equity for protection from it; that the court has the right and power to enjoin the prosecution of the boycott; that the court, in thus enjoining the boycott, can enjoin every act that may be resorted to in carrying it out, including all verbal and written acts, and particularly putting the victim on an unfair list, sending out boycott notices and circulars, making speeches for the purpose of prosecuting the boycott, etc., for without this power to prevent such publications it could not stop the boycott; and that the constitutional right of free speech and free press does not extend to secure immunity to the boycotter in such cases, is so well settled and declared by the courts as to render citations unnecessary.

If the injunction in this case had been erroneous, it would have been the duty of the accused to obey it and for the disobedience they would have been properly punished. It is only void injunctions which parties are at liberty to disobey. An injunction erroneous but not void must be as scrupulously obeyed as one entirely valid. There is not the slightest ground for contention here that this injunction was void. The court confessedly had jurisdiction of the parties and of the subject-matter of the cause, and in granting the injunction it exercised its power in conformity with the well-settled practice of equity courts.

The court did not exceed its authority in the punishment [435] it inflicted. It was not excessive. *Savin, Petitioner*, 131 U. S. 270; *United States v. Sweeney*, 95 Fed. Rep. 452, 457.

And though the proceeding was begun at the instance of the Bucks Company, and the procedure thereafter was such as the record shows it to have been, the precedents clearly show that the court was well within its authority in proceeding to inflict the punishment it did in vindicating its dignity. It was a proceeding on its face looking towards punishment, only punishment. There was absolutely noth-

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ing in the case which could suggest to the court or the accused that the party was seeking coercion of the accused into doing something which they had been commanded to do. It can only be by a forced construction, violating the plain provisions of the whole record, that even a plausible contention can be made that this was a proceeding for a civil contempt. To reach such a conclusion it would be necessary to ignore the manifest difference between punishing the accused by a fine payable to the complainant by way of reparation for the violation of the injunction, and fining or imprisoning him to compel the performance of an act he had been ordered to do.

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court.

The defendants, Samuel Gompers, John Mitchell, and Frank Morrison, were found guilty of contempt of court in making certain publications prohibited by an injunction from the Supreme Court of the District of Columbia. They were sentenced to imprisonment for twelve, nine, and six months, respectively, and this proceeding is prosecuted to reverse that judgment.

The order alleged to have been violated was granted in the equity suit of the "*Bucks Stove & Range Company v. [436] The American Federation of Labor and others*," in which the court issued an injunction restraining all the defendants from boycotting the complainant, or from publishing or otherwise making any statement that the Bucks Stove & Range Company was, or had been, on the "Unfair" or "We don't patronize" lists. Some months later the complainant filed a petition in the cause, alleging that the three defendants above named, parties to the original cause, in contempt of court and in violation of its order, had disobeyed the injunction by publishing statements which either directly or indirectly called attention to the fact that the Bucks Stove & Range Company was on the "Unfair" list, and that they had thereby continued the boycott which had been enjoined.

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The defendants filed separate answers under oath, and each denied: (1) That they had been in contempt or disregard of the court's orders; (2) that the statements complained of constituted any violation of the order; and, on the argument, (3) contended that if the publication should be construed to amount to a violation of the injunction they could not be punished therefor, because the court must not only possess jurisdiction of the parties and the subject matter, but must have authority to render the particular judgment. Insisting, therefore, that the court could not abridge the liberty of speech or freedom of the press, the defendants claim that the injunction as a whole was a nullity, and that no contempt proceeding could be maintained for any disobedience of any of its provisions, general or special.

If this last proposition were sound it would be unnecessary to go further into an examination of the case or to determine whether the defendants had in fact disobeyed the prohibitions contained in the injunction. *Ex parte Rowland*, 104 U. S. 612. But we will not enter upon a discussion of the constitutional question raised, for the general provisions of the injunction did not, in terms, [437] restrain any form of publication. The defendants' attack on this part of the injunction raises no question as to an abridgment of free speech, but involves the power of a court of equity to enjoin the defendants from continuing a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage.

Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant, by a combination of persons not immediately connected with him in business, can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do they themselves will be boycotted. Others hold that no boycott can be enjoined unless there are acts of physical violence or intimidation caused by threats of physical violence.

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But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue; when these facts exist, the strong current of authority is that the publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction. *Reynolds v. Davis*, 198 Massachusetts, 300; *Sherry v. Perkins*, 147 Massachusetts, 212; *Codman v. Crocker*, 203 Massachusetts, 150; *Brown v. Jacobs*, 115 Georgia, 452, 431; *Gray v. Council*, 91 Minnesota, 171; *Lohse Co. v. Fuelle*, 215 Missouri, 421, 472; *Thomas v. Railroad Co.*, 62 Fed. Rep. 803, 821; *Continental Co. v. Board of Underwriters*, 67 Fed. Rep. 310; *Beck v. Teamsters' Union*, 118 Michigan, 527; *Pratt Food Co. v. Bird*, 148 Michigan, 632; *Barr v. Essex*, 53 N. J. [438] Eq. 102. See also *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 156; *Bitterman v. L. & N. R. R.*, 207 U. S. 206; *Board of Trade v. Christie*, 198 U. S. 236; *Scully v. Bird*, 200 U. S. 489.

While the bill in this case alleged that complainant's interstate business was restrained, no relief was asked under the provisions of the Sherman Anti-Trust Act. But if the contention be sound that no court under any circumstances can enjoin a boycott if spoken words or printed matter were used as one of the instrumentalities by which it was made effective, then it could not do so, even if interstate commerce was restrained by means of a blacklist, boycott, or printed device to accomplish its purpose. And this, too, notwithstanding § 4 (act of July 2, 1890, c. 647, 26 Stat. 209) of that act provides, that where such commerce is unlawfully restrained it shall be the duty of the Attorney General to institute proceedings in equity to prevent and enjoin violations of the statute.

In *Loewe v. Lawlor*, 208 U. S. 274, the statute was held to apply to any unlawful combination resulting in restraint of interstate commerce. In that case the damages sued for were occasioned by acts which, among other things, did include the circulation of advertisements. But the principle announced by the court was general. It covered any

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illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.

The court's protective and restraining powers extend to every device whereby property is irreparably damaged or commerce is illegally restrained. To hold that the [489] restraint of trade under the Sherman Anti-Trust Act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent.

Society itself is an organization and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.

But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one.

In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words "Unfair," "We don't patronize," or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called "verbal acts," and as much subject

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to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject matter has power to grant an injunction.

Passing then to the consideration of the question as to whether the defendants disobeyed the injunction and were [440] therefore guilty of contempt, we are met with the objection that for want of a bill of exceptions we must treat the decree as conclusive as to the fact of disobedience, and can only examine the petition and the finding to determine whether one charges and the other finds acts which constitute a contempt of court. This view was adopted by the majority of the Court of Appeals, which treated this as a criminal proceeding, refused to examine the testimony and affirmed the judgment in analogy to the rule that on a general verdict of guilty upon an indictment containing several counts, some of which were bad, the conviction would not be reversed if there was one good count warranting the judgment.

That rule originated in cases where the finding of guilt was by the jury while the sentence was by the judge. In such cases the presumption is that the judge ignored the finding of the jury on the bad counts and sentenced only on those which were sufficient to sustain the conviction.

But there is no room for such presumption here. The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We can not suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that having found them guilty of these nine specific acts he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that

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the defendants have been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction.

[441] But in making such investigation it is again insisted that this is a proceeding at law for criminal contempt, where the findings of fact by the trial judge must be treated as conclusive, and that our investigation must be limited solely to the question whether, as a matter of law, the acts of alleged disobedience set out in the finding constitute contempt of court.

This contention, on the part of the Bucks Stove & Range Company, prevents a consideration of the case on its merits, and makes it necessary to enter into a discussion of questions more or less technical, as to whether this was a proceeding in equity or at law. Where results so controlling depend upon proper classification, it becomes necessary carefully to consider whether this was a case at law for criminal contempt, where the evidence could not be examined for want of a bill of exceptions; or a case in equity for civil contempt, where the whole record may be examined on appeal and a proper decree entered.

Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." *Bessette v. Conkey*, 194 U. S. 329. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also [442] in committing the defendant to prison. But impris-

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Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless these were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to the opposite party than in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *In re Nevitt*, 117 Fed. Rep. 451, "he carries the keys of his prison in his own pocket." He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its [443] nature, but solely as punishment for the completed act of disobedience.

It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for

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criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*.

The fact that the purpose of the punishment could be examined with a view to determining whether it was civil or criminal, is recognized in *Doyle v. London Guarantee Co.*, 204 U. S. 599, 605, 607, where it was said that "While it is true that the fine imposed is not made payable to the opposite party, compliance with the order relieves from payment, and in that event there is no final judgment of either fine or imprisonment. * * * The proceeding is against a party, the compliance with the order avoids the punishment, and there is nothing in the nature of a criminal suit or judgment imposed for public purposes upon a defendant in a criminal proceeding." *Bessette v. Conkey*, 194 U. S. 328; *In re Nevitt*, 117 Fed. Rep. 448; *Howard v. Durand*, 36 Georgia, 359; *Phillips v. Welch*, 11 Nevada, 187.

The distinction between refusing to do an act commanded—remedied by imprisonment until the party performs the required act—and doing an act forbidden, punished by imprisonment for a definite term, is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.

In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required [444], but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience. *Rapalje on Contempt*, §§ 131-134; *Wells v. Oregon Co.*, 19 Fed. Rep. 20; *In re North Bloomfield Co.*, 27 Fed. Rep. 795; *Sabin v. Fogarty*, 70 Fed. Rep. 483.

But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine, and twelve months,

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no relief whatever was granted to the complainant, and the Bucks Stove & Range Company took nothing by that decree.

If then, as the Court of Appeals correctly held, the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal. *Bessette v. Conkey*, 194 U. S. 324. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment, there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself. *Boyd v. United States*, 116 U. S. 616; *United States v. Jose*, 63 Fed. Rep. 951; *State v. Davis*, 50 W. Va. 100; *King v. Ohio Ry.*, 7 Biss. 529; *Sabin v. Fogarty*, 70 Fed. Rep. 482, 483; *Drakeford v. Adams*, 98 Georgia, 724.

There is another important difference. Proceedings for [445] civil contempt are between the original parties and are instituted and tried as a part of the main cause. But on the other hand, proceedings at law for criminal contempt are between the public and the defendant, and are not a part of the original cause. The Court of Appeals recognizing this difference held that this was not a part of the equity cause of the *Bucks Stove & Range Company v. The American Federation of Labor et al.*, and said that: "The order finding the defendants guilty of contempt was not an interlocutory order in the injunction proceedings. It was in a separate action, one personal to the defendants, with the defendants on one side and the court vindicating its authority on the other."

In this view we can not concur. We find nothing in the record indicating that this was a proceeding with the court, or, more properly, the Government, on one side and the

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defendants on the other. On the contrary, the contempt proceedings were instituted, entitled, tried, and up to the moment of sentence treated as a part of the original cause in equity. The Bucks Stove & Range Company was not only the nominal but the actual party on the one side, with the defendants on the other. The Bucks Stove Company acted throughout as complainant in charge of the litigation. As such and through its counsel, acting in its name, it made consents, waivers, and stipulations only proper on the theory that it was proceeding in its own right in an equity cause, and not as a representative of the United States, prosecuting a case of criminal contempt. It appears here also as the sole party in opposition to the defendants; and its counsel, in its name, have filed briefs and made arguments in this court in favoring affirmance of the judgment of the court below.

But, as the Court of Appeals distinctly held that this was not a part of the equity cause, it will be proper to set out in some detail the facts on this subject as they appear in the record.

[446] In the first place the petition was not entitled "*United States v. Samuel Gompers, et al.*" or "*In re Samuel Gompers, et al.*," as would have been proper, and according to some decisions necessary, if the proceedings had been at law for criminal contempt. This is not a mere matter of form, for manifestly every citizen, however unlearned in the law, by a mere inspection of the papers in contempt proceedings ought to be able to see whether it was instituted for private litigation or for public prosecution, whether it sought to benefit the complainant or vindicate the court's authority. He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the nature of the charge against him, but to know that it is a charge and not a suit. *United States v. Cruikshank*, 92 U. S. 542, 559.

Inasmuch, therefore, as proceedings for civil contempt are a part of the original cause, the weight of authority is to the effect that they should be entitled therein. But the practice has hitherto been so unsettled in this respect that we do not now treat it as controlling, but only as a fact

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to be considered along with others as was done in *Worden v. Searls*, 121 U. S. 25, in determining a similar question. Thus considering it we find that the petition instituting the contempt proceeding was entitled in the main cause "*Bucks Stove & Range Company, plaintiff, v. The American Federation of Labor, et al., defendants, No. 27,305, Equity,*" and that the answers of the defendants, every report by the examiner in chancery, every deposition, motion and stipulation, every order—including the final decree and the amended decree, were all uniformly entitled in the equity cause. Not only the pleadings in the original cause but all the testimony, oral and written, was, by reference in the petition, made a part of the contempt proceedings. The trial judge quoted largely from this oral testimony thus introduced in bulk, and the severity [447] and character of the sentence indicate that he was largely influenced by this evidence which disclosed the great damage done to the complainant's business by the boycott before the injunction issued.

It is argued the defendants' answers concluded with a statement that as questions of criminal and quasi-criminal intent were involved, a jury was better qualified to pass on the issues than a judge, and in the event he should be of opinion that the charges had not been sworn away, they moved that issues of fact should be framed and submitted to a jury. Such a motion was not inconsistent with the theory that this was a proceeding for civil contempt in equity, but was in strict accord with the practice under which questions of fact may be referred by the chancellor to a jury for determination.

In proceedings for civil contempt the complainant, if successful, is entitled to costs. *Rapalje on Contempt*, § 132. And evidently on the theory that this was a civil proceeding and to be governed by the rules applicable to an equity cause, the Bucks Stove & Range Company moved the court to amend the decree so as to award to it "its costs." After argument by solicitors for both parties, the motion was granted, and the court adjudged that the complainant do recover against the defendants its costs in said contempt

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proceeding. This ruling was no doubt correct, as this was a civil case, but could not have been granted in a proceeding for criminal contempt, where costs are not usually imposed in addition to the imprisonment. Where they are awarded they go to the Government, for the use of its officers, as held by Justice Miller, on circuit. *Durant v. Washington County*, 4 Woolw. 297.

In another most important particular the parties clearly indicated that they regarded this as a civil proceeding. The complainant made each of the defendants a witness for the company, and, as such, each was required to testify [448] against himself—a thing that most likely would not have been done, or suffered, if either party had regarded this as a proceeding at law for criminal contempt—because the provision of the Constitution that “no person shall be compelled in any criminal case to be a witness against himself” is applicable, not only to crimes, but also to quasi-criminal and penal proceedings. *Boyd v. United States*, 116 U. S. 616.

Both on account of the distinct ruling to the contrary by the Court of Appeals, and the importance of the results flowing from a proper classification, we have with some detail discussed the facts appearing in the record, showing that both parties treated this as a proceeding which was a part of the original equity cause. In case of doubt this might of itself justify a determination of the question in accordance with the mutual understanding of the parties, and the procedure adopted by them. But there is another and controlling fact, found in the brief but sufficient prayer, with which the petition concludes. We have already shown that in both classes of cases there must be allegation and proof that the defendant was guilty of contempt, and a prayer that he be punished. The classification then depends upon the question as to whether the punishment is punitive, in vindication of the court's authority, or whether it is remedial by way of a coercive imprisonment, or a compensatory fine payable to the complainant. Bearing these distinctions in mind, the prayer of the petition is significant and determinative. After setting out in detail the acts of alleged disobedience, the petition closes with the

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following prayers: (1) "That the defendants show cause why they should not be adjudged in contempt of court and be punished for the same," and (2) "that petitioner may have such other and further relief as the nature of its case may require."

"Its case"—not the Government's case. "That petitioner may have relief"—not that the court's authority [449] may be vindicated. The Bucks Stove & Range Company was not asserting the rights of the public, but seeking "such other and further relief as the nature of its case may require." If it had asked that the defendants be forced to pay a fine to the Government, or be punished by confinement in jail, there could have been no doubt that punishment pure and simple was sought.

On the other hand, if it had prayed that the court impose a fine payable to the Bucks Stove & Range Company, the language would have left no doubt that remedial punishment was sought. It is not different in principle if, instead of praying specifically for a fine payable to itself, it asks generally for "such relief as the nature of its case may require." In either event such a prayer was appropriate to a civil proceeding, and under it the court could have granted that form of relief to which the petitioner was entitled. But as the act of disobedience consisted not in refusing to do what had been ordered, but in doing what had been prohibited by the injunction, there could be no coercive imprisonment, and therefore the only relief, if any, which "the nature of petitioner's case" admitted, was the imposition of a fine payable to the Bucks Stove & Range Company.

There was therefore a departure—a variance between the procedure adopted and the punishment imposed, when, in answer to a prayer for remedial relief, in the equity cause, the court imposed a punitive sentence appropriate only to a proceeding at law for criminal contempt. The result was as fundamentally erroneous as if in an action of "*A. v. B.* for assault and battery," the judgment entered had been that the defendant be confined in prison for twelve months.

If then this sentence for criminal contempt was erroneously entered in a proceeding which was a part of the

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equity cause, it would be necessary to set aside the order of imprisonment, examine the testimony and thereupon [450] make such decree as was proper, according to the practice in equity causes on appeal. And, if upon the examination of the record it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used, yet the power of courts to punish for contempts, is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.

This power "has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors." *Bessette v. Conkey*, 194 U. S. 324, 333.

There has been general recognition of the fact that the courts are clothed with this power and must be authorized to exercise it without referring the issues of fact or law to another tribunal or to a jury in the same tribunal. For if there was no such authority in the first instance there would be no power to enforce its orders if they were disregarded in such independent investigation. Without authority to act promptly and independently the courts could not administer public justice or enforce the rights of private litigants. *Bessette v. Conkey*, 194 U. S. 337.

Congress, in recognition of the necessity of the case, has [451] also declared (Rev. Stat., § 725) that the courts of the

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United States "shall have power to punish by fine or imprisonment contempts of their authority * * *" including "disobedience * * * by any party to any lawful order * * * of the said courts." But the very amplitude of the power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper. For that reason we can proceed no further in this case, because it is both unnecessary and improper to make any decree in this contempt proceeding.

For on the hearing of the appeal and cross appeal in the original cause in which the injunction was issued, it appeared from the statement of counsel in open court that there had been a complete settlement of all matters involved in the case of *Bucks Stove & Range Company v. The American Federation of Labor et al.* This court therefore declined to further consider the case, which had become moot, and those two appeals were dismissed. 219 U. S. 581. When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled—of course without prejudice to the power and right of the court to punish for contempt by proper proceedings. *Worden v. Searls*, 121 U. S. 27. If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.

But, as we have shown, this was a proceeding in equity for civil contempt where the only remedial relief possible was a fine payable to the complainant. The company prayed "for such relief as the nature of its case may require," and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require and was not entitled to any [452] compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part. *Bessette v. Conkey*, 194 U. S. 328, 333; *Worden v. Searls*, 121 U. S. 27; *State v. Nathans*, 49 S. Car. 207. The criminal sentences imposed in the civil case, therefore, should be set aside.

Syllabus.

The judgment of the Court of Appeals is reversed, and the case remanded with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the case to that court with direction that the contempt proceedings instituted by the Bucks Stove & Range Company be dismissed, but without prejudice to the power and right of the Supreme Court of the District of Columbia to punish by a proper proceeding, contempt, if any, committed against it.

Reversed.

GOMPERS v. UNITED STATES.*

ERROR TO, APPEAL FROM AND ON PETITION FOR CERTIORARI TO
THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 640, 574. Argued January 7, 8, 1914; restored to docket for reargument April 6, 1914; reargued April 20, 21, 1914.—Decided May 11, 1914.

[223 U. S. 604.]

While this court cannot review by appeal or writ of error a judgment of the Court of Appeals of the District of Columbia punishing for contempt, it may grant a writ of certiorari to review the same. Where two parties petition for writs of certiorari to review the same judgment, but the entire matter can be disposed of on one petition, the other will be denied.^b

Where the statute of limitations was pleaded, and, after a decision that it was inapplicable, one general exception was presented on his behalf in that regard, the rights of the defendant are sufficiently preserved.

[605] The provision in Rev. Stat., § 1044, that no person shall be prosecuted for an offense not capital unless the indictment is found or information instituted within three years after commission of the offense applies to acts of contempt not committed in the presence of the court.

Provisions of the Constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. Their significance is not to be gathered simply from the words and a dictionary but by considering their origin and the line of their growth.

* For civil contempt proceedings (221 U. S. 418), see *ante*, page 760.

^b Syllabus copyrighted, 1914, by The Banks Law Publishing Company.

Syllabus.

Contempts are none the less offenses because trial by jury does not extend to them as a matter of constitutional right.

The substantive portion of § 1044, Rev. Stat., is that no person shall be tried for any offense not capital except within the specified time, and the reference to form of procedure by indictment or information does not take contempts out of the statute because the procedure is by other methods than indictment or information.

Quare, whether an indictment will lie for a contempt of a court of the United States.

In dealing with the punishment of crime, some rule as to limitations should be laid down, if not by Congress, by this court.

As the power to punish for contempt has some limit, this court regards that limit to have been established as three years by the policy of the law, if not by statute, by analogy. *Adams v. Wood*, 2 Cranch, 336.

40 App. D. C. 233, reversed.

[58 L. Ed. 1115.*]

[APPEAL—MODE OF REVIEW—APPEAL ON ERROR.—A judgment of fine or imprisonment in proceedings for an alleged criminal contempt of an injunction is not reviewable by appeal.

For other cases, see Appeal and Error, II b. in Digest Sup. Ct. 1908.

ERROR TO DISTRICT OF COLUMBIA COURT OF APPEALS—CRIMINAL CONTEMPT.—A writ of error will not lie from the Federal Supreme Court to the District of Columbia Court of Appeals to review a judgment rendered on an appeal from the Supreme Court of the District in proceedings to punish the alleged criminal contempt of an injunction.

For other cases, see Appeal and Error, 1075-1081, in Digest Sup. Ct. 1908.

LIMITATION OF ACTIONS—WHEN STATUTE BEGINS TO RUN—CRIMINAL CONTEMPT.—The running of the three years' limitation prescribed by U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, for criminal prosecutions against proceedings to punish criminal contempts of a decree enjoining the continuance of a boycott, was not postponed until such boycott was abandoned, but such statute began to run as respects each specific act charged as a substantive offense in disobedience of the injunction upon the date of the commission of such act.

For other cases, see Limitation of Actions, II, in Digest Sup. Ct. 1908.

* The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 58, page 1115, Lawyers' Edition, of the Supreme Court Reports. Syllabus copyrighted, 1913, 1914, by The Lawyers Co-operative Publishing Company.

Statement of the Case.

LIMITATION OF ACTIONS—CRIMINAL CONTEMPT.—Original contempts are none the less crimes within the meaning of U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, prescribing a three years' limitation for criminal prosecutions, because the constitutional right of trial by jury in criminal cases does not extend to such contempts.

For other cases, see Limitation of Actions, III 1, in Digest Sup. Ct. 1908.

LIMITATION OF ACTIONS—CRIMINAL CONTEMPT.—Proceedings to punish acts not committed in the presence of the court as criminal contempts of an injunction previously granted are none the less governed by the three years' limitations of U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, which provides that "no person shall be prosecuted, tried, or punished for any offense not capital * * * unless the indictment is found or the information is instituted within three years next after such offense shall have been committed," because such contempt proceedings may not be instituted by an indictment or information.

For other cases, see Limitation of Actions, III 1, in Digest Sup. Ct. 1908.

LIMITATION OF ACTIONS—CRIMINAL CONTEMPT.—The Federal Supreme Court would prescribe by analogy a three years' limitation for proceedings to punish past acts not committed in the presence of the court as criminal contempts of an injunction previously granted if the case were not covered by the provisions of U. S. Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 725, that "no person shall be prosecuted, tried, or punished for any offense not capital * * * unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.")]

For other cases, see Limitation of Actions, III 1, in Digest Sup. Ct. 1908.]

The facts, which involve the construction of § 1044, Rev. Stat., and its application to past acts of contempt, are stated in the opinion.

Mr. Alton B. Parker and Mr. Jackson H. Ralston, with whom *Mr. William E. Richardson* was on the brief, for plaintiffs in error and appellants.

Mr. J. J. Darlington and Mr. Daniel Davenport, with whom *Mr. James M. Beck* was on the brief, for the United States.

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Mr. Justice HOLMES delivered the opinion of the court.

These are proceedings for alleged criminal contempts in the matter that was before this court in *Gompers v. Bucks* [606] *Stove & Range Co.*, 221 U. S. 418. In that case the proceedings instituted by the Bucks Stove & Range Company to punish the petitioners were ordered to be dismissed, but without prejudice to the power of the Supreme Court of the District to punish contempt, if any, committed against it. The decision was rendered on May 15, 1911, and the next day the Supreme Court of the District appointed a committee to inquire whether there was reasonable cause to believe the plaintiffs in error guilty, in wilfully violating an injunction issued by that court on December 18, 1907, and, if yea, to present and prosecute charges to that effect. The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court.

The committee, on June 26, 1911, reported and charged that the parties severally were guilty of specified acts in violation of the injunction, being the same acts of which they had been found guilty by the Supreme Court in the former case. Rules to show cause were issued on the same day. The defendants pleaded the Statute of Limitations. Rev. Stat., § 1044, as to most of the charges, and not guilty. There was a trial, the Statute of Limitations was held inapplicable and the defendants were found guilty and sentenced to imprisonment for terms of different lengths, subject to exceptions which by agreement were embodied in a single bill. The Court of Appeals reduced the sentences to imprisonment for thirty days in the case of Gompers and fines of \$500 for each of the other two. 40 App. D. C. 293. The defendants brought a writ of error and an appeal to this court and also petitioned for a writ of certiorari. Of course an appeal does not lie, nor does a writ of error, but the writ of certiorari is granted. [607] The judges of the Supreme Court also petitioned for a writ of certiorari, but

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as the case will be disposed of on the first mentioned petition, the other will be denied.

The injunction, subsequently held too broad, not only forbade the defendants to combine to obstruct the business of the Bucks Stove & Range Company, or to declare or threaten any boycott against it (such a boycott already having been declared), but also to publish any statement calling attention of any body to any such boycott, or any statement of like effect, tending to any injury of the Company's business. This decree, although made on December 18, did not become operative until December 23, 1907. Before going to the Court of Appeals the injunction in substantially the same form was made permanent on March 23, 1908. It may be assumed for the purposes of our decision that the evidence not only warranted but required a finding that the defendants were guilty of some at least of the violations of this decree that were charged against them, and so we come at once to consider the Statute of Limitations, which is their only real defence. A preliminary objection was urged, to be sure, that the question of the validity of that defence was not reserved, but there is nothing in it. The bar was pleaded, there was a motion to dismiss on that ground for want of a replication, there was a decision that the statute did not apply to contempts, and the counsel for the plaintiffs in error stated at the trial that there was one general exception presented on their behalf with regard to that. We can not doubt that it was perfectly understood, or that the record shows, that the plaintiffs in error preserved all their rights.

The statute provides that "no person shall be prosecuted, tried, or punished for any offense, not capital, except * * *, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed." Rev. Stat., § 1044. Act of April 13, 1876, c. 56, 19 Stat., 32. The plaintiffs in [608] error treat these proceedings as having begun on May 16, 1911, when the Supreme Court directed an inquiry. They certainly did not begin before that date; so that, if the statute applies, contempts prior to May 16, 1908, would be barred. It is argued with force that the inquiry was directed

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only to breaches of the preliminary injunction, which expired by its own terms upon the making of the final decree on March 23, 1908, and that therefore everything legitimately before the court happened more than three years before. But as the report mentioned the final decree and charged a few acts later than March 23, though mostly rather unimportant, and as the order to show cause referred to a violation of the injunctions, in the plural, it perhaps would savor of a technicality that we should be loath to apply on either side, if we did not deal with all that is charged.

The charges against Gompers are: 1, hurrying the publication of the January number of the American Federationist and distributing many copies after the injunction was known and before it went into effect, in which number the Bucks Stove & Range Company was included in the "We don't patronize" list; 2, circulating other copies in January, 1908; 3, on and after December 23, 1907, circulating another document to the like effect with comments, some of which were lawful criticism, but others of which suggested that the injunction left the members of labor organizations free to continue their boycott; 4, publishing in February, 1908, a copy of the decree with the suggestion that those who violated the injunction outside of the District could not be punished unless they came within it; 5, in January and February, 1908, publishing in conjunction with the other defendants a paper appealing for financial aid, commenting on the injunction as invading the liberty of the press and free speech and reprinting the before-mentioned comments and suggestions; 6, in March, 1908, again suggesting that no law compelled the purchase [609] of a Bucks stove; 7, in April, 1908, after the final decree, reiterating the same suggestion in the American Federationist; 8, in April, 1908, repeating similar suggestions by transparent innuendo in a public address; 9, again repeating them in another address, on or about May 1; 10, and again in the July issue of the American Federationist; 11, publishing in the September Federationist an editorial characterizing the injunction as an invasion of constitutional freedom (which hardly seems to exceed lawful comment unless on the ground

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that the case was not finished, although mistaken in its law); 12, in a report published after September 9, 1908, saying that if the Executive Council of the Federation of Labor obeyed the injunction they could not report the state of the case to the Denver convention, and that they did not see how they could refuse to give an account of their doings; 13, on September 29, 1908, saying in a public address that the injunction forbade him to discuss the case, but that he must (seemingly not going beyond that declaration); 14, on October 26, 1908, recurring in a single phrase in an address to his old suggestion that no law compelled his hearers to buy a Bucks stove; 15, in November, 1908, in an address which he caused to be published in the *Federationist* in January, 1909, again referring to the injunction, mentioning his past advice and suggestions and that he had been called on to show cause why he should not be adjudged guilty of contempt (in the former proceeding), and asking how he could have done otherwise; and finally, 16, in a report made in November, 1909, referring to the judge as so far having transcended his authority that even judges of the Court of Appeals have felt called upon to criticize his action, and saying that in such circumstances it is the duty of the citizens to refuse obedience and to take whatever consequences, may ensue. The charges against Mitchell and Morrison are mainly for having taken part in some of the above-mentioned publications, but need not [610] be stated particularly, as all the acts of any substance in Mitchell's case and all in that of Morrison were more than three years old when these proceedings began.

The boycott against the company was not called off until July 19 to 29, 1910, and it is argued that even if the statute applies the conspiracy was continuing until that date, *United States v. Kissel*, 218 U. S. 601, 607, and therefore that the statute did not begin to run until then. But this is not an indictment for conspiracy, it is a charge of specific acts in disobedience of an injunction. The acts are not charged as evidence but as substantive offenses; each of them, so far as it was a contempt, was punishable as such, and was charged as such, and therefore each must be judged

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by itself; and so we come to what, as we already have intimated, is the real question in the case.

It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous; they are not within the protection of the Constitution and the amendments giving a right to trial by jury, &c., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. *Robertson v. Baldwin*, 165 U. S. 275, 281, 282. It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are [611] they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S.; p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way. See 7 Halsbury, Laws of England, 280, *sub v. Contempt of Court* (604); *Re Clements v. Erlanger*, 46 L. J., N. S., pp. 375, 383. *Matter of Macleod*, 6 Jur. 461; *Schreiber v. Latensard*, 2 Dick. 592; *Wellesley's Case*, 2 Russ. & M. 689; 667; *In re Pollard*, L. R. 2 P. C. 106, 120; *Ex parte Kearney*, 7 Wheat. 38, 43; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326, 381, 332; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441.

We come, then, to the construction of the statute. It has been assumed that the concluding words "unless the indictment is found or the information is instituted within three

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years" limit the offences given the benefit of the act to those usually prosecuted in that way, and the counsel for the petitioners were at some pains to argue that the charges of the committee amounted to an information; a matter that opens vistas of antiquarian speculation. But this question is not one to be answered by refinements and curious inquiries. In our opinion the proper interpretation of the statute begins with the substantive, not with the adjective part. The substantive portion of the section is that no person shall be tried for any offence not capital except within a certain time. Those words are of universal scope. What follows is a natural way of expressing that the proceedings must be begun within 8 years; indictment and information being the usual modes by which they are begun and very likely no other having occurred to those who drew the law. But it seems to us plain that the dominant words of the act are "no person shall be prosecuted, tried, or punished for any offence not capital" unless.

No reason has been suggested to us for not giving to the [612] statute its natural scope. The English courts seem to think it wise, even when there is much seeming reason for the exercise of a summary power, to leave the punishment of this class of contempts to the regular and formal criminal process. *Matter of Macleod*, 6 Jur. 461. Maintenance of their authority does not often make it really necessary for courts to exert their own power to punish, as is shown by the English practice in more violent days than these, and there is no more reason for prolonging the period of liability when they see fit to do so than in the case where the same offence is proceeded against in the common way. Indeed, the punishment of these offences peculiarly needs to be speedy if it is to occur. The argument loses little of its force if it should be determined hereafter, a matter on which we express no opinion, that in the present state of the law an indictment would not lie for a contempt of a court of the United States.

Even if the statute does not cover the case by its express words, as we think it does, still, in dealing with the punishment of crime a rule should be laid down, if not by Congress by this court. The power to punish for contempt must have

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some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the Government. By analogy if not by enactment the limit is three years. The case can not be concluded otherwise so well as in the language of Chief Justice Marshall in a case where the statute was held applicable to an action of debt for a penalty. *Adams v. Woods*, 2 Cranch. 336, 340, 341, 342: "It is contended that the prosecutions limited by this law, are those only which are carried on in the form of an indictment or information, and not those where the penalty is demanded by an action of debt. But if the words of the act be examined they will be found to apply, not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence. It is not declared that no indictment shall be found * * * But it is declared that 'No person shall be prosecuted, tried, or punished' * * *. In expounding this law, it deserves some consideration that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." The result is that the judgments, based as they are mainly upon offences that could not be taken into consideration, must be reversed.

Judgments reversed.

Mr. Justice VAN DEVANTER and Mr. Justice PITNEY dissent.

POST v. BUCKS STOVE & RANGE CO. ET AL.

(Circuit Court of Appeals, Eighth Circuit. November 22, 1912.)

[200 Fed. Rep. 918.]

CORPORATIONS (§ 297)—DIRECTORS—AUTHORITY—BUSINESS POLICY.—

While directors of a private business corporation may not act oppressively, fraudulently, or in such a manner as to destroy the corporate existence, or contrary to law or the purposes for which the corporation was organized, and may not dissipate its

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assets or secure private advantage at corporate expense, they are nevertheless the governing body, representing both the majority and minority stockholders, and as such possess a wide discretion in determining its business policies and the methods of executing them, which a stockholder can not control or have revised by an appeal to the courts.*

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1274-1291; Dec. Dig. § 297.]

CORPORATIONS (§ 202)—DIRECTORS—ACTION—SETTLEMENT OF LITIGATION—RIGHTS OF OBJECTING STOCKHOLDERS.—A controversy having arisen between a corporation engaged in manufacturing stoves and its employes, who were members of a labor organization, the union employes quit, and the labor organization inaugurated an extensive boycott against the corporation and its products, whereupon suit was instituted for an injunction against the labor organization and its leaders, and, an order directing the issuance of a modified injunction having been sustained by the Circuit Court of Appeals, both parties appealed to the Supreme Court, pending which a settlement was arrived at, whereby the corporation released its right to sue for treble damages under Sherman Anti-Trust Act, July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), on the ground that the labor organization constituted an unlawful combination in restraint of trade and commerce, to which settlement complainant, a minority stockholder, objected. *Held*, that such settlement was within the jurisdiction of the corporation's board of directors in the ordinary management of the corporation's affairs, and, having been entered into in good faith, was binding on such minority stockholder notwithstanding his protest, and he was therefore not entitled thereafter to maintain a suit for such damages for the benefit of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 770-780; Dec. Dig. § 202.]

MONOPOLIES (§ 12)—LABOR UNION—CONTRACT—VALIDITY.—A contract between a manufacturing corporation and a labor union, by which the corporation thereafter agreed to pay union wages and to comply with union hours of labor and conditions of employment, but which contained no direct provision binding the corporation not to employ non-union men, was not objectionable as tending to create a monopoly in favor of members of the unions to the exclusion of others seeking employment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

* Syllabus copyrighted, 1913, by West Publishing Company.

Opinion of the Court.

Suit by C. W. Post against the Buck's Stove & Range Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, *Buck's Stove & Range Co. v. American Federation of Labor*, 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 84 L. R. A. (N. S.) 874.

[919] *Charles C. Collins*, of St. Louis, Mo. (*Arthur B. Williams*, on the brief), for appellant.

Charles M. Polk, of St. Louis, Mo. (*A. & J. F. Lee*, of St. Louis, Mo., on the brief), for Buck's Stove & Range Co.

Jackson H. Ralston, of Washington, D. C. (*Frederick L. Siddons* and *Wm. E. Richardson*, both of Washington, D. C., and *John S. Lehmann*, of St. Louis, Mo., on the brief), for American Federation of Labor and others.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

HOOK, Circuit Judge.

This is a suit by Charles W. Post, as a stockholder of the Buck's Stove & Range Company, to enforce for its benefit a cause of action against the American Federation of Labor, its allied organizations, and their representatives, for treble damages under section 7 of the Sherman Anti-Trust Act (26 Stat. 209), resulting from a combination in restraint of trade and commerce. The bill of complaint was dismissed on demurrer, and Post appealed.

The Stove Company is a Missouri corporation, engaged in the manufacture and sale in interstate commerce of stoves and ranges. Its general offices and factory are at St. Louis, Mo. Its capital stock is \$1,500,000, of which Post owns about 7 per cent. Some years ago a controversy arose in one of its manufacturing departments over the hours of labor, and the union employes quit. Thereupon the labor organizations throughout the United States inaugurated an extensive boycott against the company, its manufactured prod-

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ucts, and those who persisted in dealing in them, thereby, according to the bill of complaint, unlawfully inflicting upon it a financial loss to the extent of \$250,000. The Stove Company brought a suit in the Supreme Court of the District of Columbia and obtained an injunction in broad terms. On appeal to the Court of Appeals of the District, the company again prevailed, though the injunction was substantially modified. 33 App. D. C. 83, 32 L. R. A. (N. S.) 748. From the decree of that court the parties, both complainant and defendant, took appeals to the Supreme Court of the United States, but before the hearing they amicably adjusted their differences by executing writings containing expressions of mutual friendship and consideration, and provisions that the company would not sue because of past controversies, that it would establish union wages, hours of labor, and conditions of employment, and that the labor organizations on their part commended the product of the company to their members, sympathizers, and friends. When the settlement came to the attention of the Supreme Court, it dismissed the appeals as involving questions purely moot. 219 U. S. 581, 31 Sup. Ct. 472, 55 L. Ed. 345. A phase of the controversy appears in 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. Post protested against the settlement. In communications to the officers and directors of his company, he demanded that, having won its fight against the unlawful boycott, its right to recover the damages sustained be enforced. Failing in this, he brought the present suit as a stockholder, claiming the settlement was without consideration, and was illegal and void. The company was made a party [920] defendant according to equity rule 94 then in force. The foregoing recital sufficiently presents the merits of the case, which we will consider to the exclusion of less important matters.

[1] The settlement with the labor organizations was made upon the authority of the board of directors of the Stove Company, and the only objection or complaint by any one interested in or connected with it was by the minority stockholder. As the chartered agents of a corporation, the directors represent, not only the artificial body, but also all who

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own its shares of stock. While they must be mindful of the corporate welfare, and not act oppressively, fraudulently, or destructively of the corporate existence, or contrary to the laws of the State or Nation, or the purposes for which the corporation was organized, nor dissipate its assets or secure private advantage at corporate expense, yet as its governing body they possess a wide discretion in determining its business policies and the methods of executing them, which a stockholder cannot control or have revised by an appeal to the courts. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Delaware & Hudson Co. v. Railroad*, 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862. In *United States v. Union Pacific R. Co.*, 98 U. S. 569, 611, 25 L. Ed. 143, the Supreme Court, speaking of a corporation, said:

"So long as it exists in the possession and unrestrained exercise of all its corporate powers, its board of directors, unless under judicial prohibition or compulsion, is vested with the sole authority to decide whether it will assert its right of action for a supposed injury, or will condone it."

In some respects there is an analogy between a corporation and a representative government, which proceeds according to the views of the majority within constitutional lines. The minority must rely upon persuading the greater number of the right or expediency of their position, and, failing that, must yield, unless some recognized limitation has been broken.

[2] It is averred in the bill of complaint that the Stove Company was injured to the extent of \$250,000 by an illegal boycott of its interstate business, that the Sherman Act gave it the right to threefold damages, and that the defendants who did the wrong were solvent and good for the amount. Upon this it is argued that the directors, against the protest of the complaining stockholder, paid \$750,000 for immunity from unlawful attacks, and thereby gave away assets aggregating half the amount of its capital stock without consideration. The claim for a penalty or a punitive increase of actual damage, like one for a forfeiture, is not a favorite in the law. In no true sense was the claim of that kind in the case at bar a property asset, and we do not doubt that the managing officers of the corporation could in their dis-

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creation waive or refuse to enforce it without being brought to account in a court of equity. The claim for actual damage to the business of the company was an asset in a way, but the fact that it was unacknowledged and unliquidated still remained. The averments in the bill do not change its essential character. It was not like money in bank, nor even a credit with the debtor's sense of obligation born of a quid pro quo. Barring adjustment, its liquidation and collection [921] to any extent meant continued expensive litigation. In the most favorable view, that was the prospect before the directors, and they were entitled to look at it practically as is commonly done in business transactions. The courts favor settlements of controversies, both before and after litigation, and will rarely overhaul them with a critical eye.

It is also inaccurate to say there was a mere purchase of immunity from unlawful attacks upon the business of the company, or that its claim for damages was given up without consideration. When the litigation with the labor organization stopped, it stood upon the decree of injunction of the Court of Appeals of the District of Columbia. It is not our province to review that decree, but presumably it protected the company in all its legal rights. But, however this may be, there belonged to the labor organizations a large field of legitimate endeavor and activity, with respect to which every business man and corporation might lawfully contract with them, and regarding which negotiations and agreements are of everyday occurrence. Organized labor has become an important factor in modern industrial life, where its influence is widely recognized; and its rightful status in the law should not be denied because of excesses committed in its name. The directors of the Stove Company, charged with the management of its extensive interests, may have come to believe in the economic advantage of union wages, hours of labor, and conditions of employment, and may have regarded the affirmative friendship of the labor organizations as valuable and desirable, and their disfavor, not unlawfully exercised, as undesirable. In such a situation, and presumably it arose, there were sufficient elements of consideration for the contract, and to overthrow it we should

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not hunt for others, not expressed in the writings or acknowledged by either party. We see in the daily chronicals of business affairs frequent instances of similar negotiations and agreements in which the managers of large enterprises participate, and what they do is accepted without question. The directors of the Stove Company did nothing more, save to yield an unliquidated claim for damages. It was their province to determine the wisdom or expediency of the course adopted. They did not act oppressively or fraudulently, and no stockholder gained or lost more or less than another. They acted in good faith, according to the lights given them, and for the welfare of all the interests in their charge.

[18] It is further contended that the settlement in question provides for a "closed shop," that is to say, a place where union labor only is employed, and that a contract of that character is unlawful, because it restricts competition and tends to create a monopoly in favor of members of the unions, to the exclusion of all others seeking employment. Counsel for the Stove Company and for the labor organizations deny that is the effect of the contract, and we agree with them. There is no direct provision requiring it, and it does not follow from the adoption of "union wages, hours of labor, and conditions of employment," nor from the expressions of the friendly attitude of the management of the company and their purpose to treat organized labor "wisely and conservatively and upon a friendly basis." The details as to wages, hours of labor, and conditions of employment were not defined, but were intrusted to the company for execution. We think [982] that according to general observation it is not at all uncommon for the conditions contemplated by the contract to exist in open shops, where both union and non-union labor are employed. This being so, we need not stop to consider whether a contract for a closed shop would be valid or invalid.

The decree is affirmed.

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VIRTUE v. CREAMERY PACKAGE MANUFACTURING COMPANY AND OWATONNA COMPANY.*

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

(No. 80. Argued December 9, 10, 1912—Decided January 20, 1913.)

[227 U. S. 8.]

To sustain an action under § 7 of the Sherman Anti-Trust Act co-operation by at least two of the defendants to cause the damage complained of must be shown.^b

[9] The owner of a patent has exclusive rights of making, using and selling, which he may keep or transfer in whole or in part.

Patents and patent rights can not be made a cover for violation of law; but they are not so used when only the rights conferred by law are exercised.

Patent rights can be protected by a party to an illegal combination.

While the combined effect of the separate acts alleged to have made the combination illegal must be regarded as a whole, the strength of each act must be considered separately.

Assertion of patent rights may be so conducted as to constitute malicious prosecution; but failure of plaintiff to maintain the action does not necessarily convict of malice.

Mere coincidence in time in the bringing by separate parties of suits for infringements on patents against the same defendant does not necessarily indicate a combination on the part of those parties to injure the defendant within the meaning of § 7 of the Sherman Anti-Trust Act.

An action under § 7 of the Sherman Act based on a combination between the defendants can not be sustained by proof of malicious prosecution on the part of only one of the defendants.

Where an action under § 7 of the Sherman Act was tried in the Circuit Court and argued in the Circuit Court of Appeals on the basis of co-operation between the defendants, this court will not consider a contention raised for the first time that one of the defendants was itself a combination offensive to the statute.

In this case it does not appear that the contracts between the defendants were made for the purpose of injuring the plaintiff, and both courts below having so held this court also so holds:

179 Fed. Rep. 115, affirmed.

* For opinion of the Circuit Court of Appeals (179 Fed. 115), see volume 3, page 794.

^b Syllabus and statements of arguments copyrighted, 1913, by The Banks Law Publishing Company.

Statement of the Case.

[57 L. Ed. 393.*]

[MONOPOLY—COMBINATION IN RESTRAINT OF TRADE—PATENTED ARTICLES.]—A contract by which a corporation, manufacturing dairy supplies under various patents owned by it, and selling them throughout the United States, constituted another corporation its exclusive sales agent, and fixed the list price of its products, does not violate the prohibition of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 5200), against combinations in restraint of commerce.

For other cases, see Monopoly, II. b, in Digest Sup. Ct. 1908.

MONOPOLY—COMBINATION IN RESTRAINT OF TRADE—TREBLE DAMAGES.—A corporation manufacturing dairy products under patents owned by it is not chargeable with participation in a combination formed contrary to the act of July 2, 1890, by its exclusive sales agent and other manufacturers and dealers, so as to render the corporation and its agent liable under the treble damage clause of § 7 of that act to persons joined as defendants in simultaneous patent infringement suits separately brought by such principal and agent, either because the sales agency contract, which antedated the illegal combination, provided that the manufacturer should protect the agent from all suits for infringement, should defend the validity of the patents, and promptly attack infringers, or because of a supplementary contract for the settlement of claims growing out of reciprocal charges of infringement which has no other connection with the unlawful combination than that some of the claims were against corporations which were parties to that unlawful agreement, or because of any negotiations preceding the execution of the sales agency contract which have for their inducement and object the settlement of controversies and rights growing out of earlier contracts, or because of the simultaneous bringing of the infringement suits.

For other cases, see Monopoly, II. a, in Digest Sup. Ct. 1908.

APPEAL—SCOPE OF REVIEW—QUESTION NOT RAISED BELOW.—A contention not made either in the Circuit Court or in the Circuit Court of Appeals, and which is contrary to the theory on which the case was tried, will not be considered by the Federal Supreme Court.]

For other cases, see Appeal and Error, VIII. j. 3, in Digest Sup. Ct. 1908.

The facts, which involve the construction of § 7 of the Sherman Anti-Trust Act and what constitutes an illegal combination thereunder, are stated in the opinion.

* The paragraphs following, in brackets, comprise the syllabus of the case in volume 57, page 393, Lawyers Edition, Supreme Court Reports. Syllabus copyrighted, 1912, 1913, by The Lawyers Co-operative Publishing Company.

Argument for Plaintiff.

Mr. Harlan E. Leach, with whom *Mr. James F. Williamson* and *Mr. James A. Tawney* were on the brief, for plaintiff in error:

It is not necessary to prove the commission of any tort, wrongful act or crime on the part of defendants, aside from what is prohibited by the terms of the Sherman Anti-Trust Act, in order to make the defendants liable [10] in damages to the plaintiffs in this action. *Loewe v. Lawlor*, 208 U. S. 274; *Montague v. Lowry*, 193 U. S. 38; *Chattanooga F. & P. Works v. Atlanta*, 203 U. S. 390; *Jayne v. Loder*, 149 Fed. Rep. 21; *Wheeler-Stenzel Co. v. National Window Glass Ass'n*, 152 Fed. Rep. 864; *S. C.*, 10 L. R. A. (N. S.) 972; *Penn. Sugar Co. v. Am. Sugar Co.*, 166 Fed. Rep. 254; *People's Tobacco Co. v. Am. Tobacco Co.*, 170 Fed. Rep. 396; *Monarch Tobacco Works v. Am. Tobacco Co.*, 165 Fed. Rep. 774; *Swift v. United States*, 196 U. S. 395.

The act of combining—the concerted action—is unlawful in itself, and is the basis of a cause of action for damages. *Loewe v. Lawlor*; *Swift v. United States*; *Penn. Sugar Co. v. Am. Sugar Co.*; *Jayne v. Loder*, *supra*; *Aikens v. Wisconsin*, 195 U. S. 194; *Ellis v. Inman*, 131 Fed. Rep. 182.

It is not necessary that the act which caused the damage should be anything in itself prohibited by the Anti-Trust Act. It is not necessary that it be a step in the formation of the "contract," "combination," or "conspiracy," or a step in the attempt to secure monopoly. It is sufficient if such an act originated in, or was directly associated with, the motives which were the cause of the contract, combination, conspiracy, or attempt to secure monopoly. *Chattanooga Works v. Atlanta*, 203 U. S. 390.

Plaintiffs in error were engaged in interstate trade and commerce. *Loewe v. Lawlor*; *Montague v. Lowry*; *Penn. Sugar Co. v. Am. Sugar Co.*, *supra*; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423.

Every agreement or transaction whose direct effect is to destroy or prevent competition is in restraint of trade. *Northern Securities Co. v. United States*, 193 U. S. 197; *United States v. American Tobacco Co.*, 164 Fed. Rep. 700; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *United*

Argument for Plaintiff:

States v. Trans. Mo. Freight Ass'n, 166 U. S. 290; *United States v. Joint Traffic Ass'n*, 171 U. S. 505.

[11] A scheme or contract whereby a corporation disposes of its business, and agrees to ever thereafter remain out of business, is illegal and void, under the Sherman Anti-Trust Act. *Shawnee Compress Co. v. Anderson*, 209 U. S. 423.

A combination has obtained a monopoly when it has reached a position where it can control prices and suppress competition. *United States v. Am. Tobacco Co.*, 164 Fed. Rep. 700, 721.

Where the necessary and direct effect of the combination is to restrain trade or effectuate a monopoly, the intent is immaterial. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211.

But where acts in themselves are not directly in restraint of trade or do not directly tend toward a monopoly, or are only an attempt, the intent of the parties becomes material. *Swift v. United States*; *Loewe v. Lawlor*, *supra*; *Penn. Sugar Co. v. Am. Refining Co.*, 166 Fed. Rep. 254; *Bigelow v. Calumet & Hecla Co.*, 167 Fed. Rep. 704, 709.

In cases of conspiracy it is always permissible to allege and prove the history and various steps culminating in the final conspiracy, even though the previous steps were separate and distinct offenses, if they tend to throw light on the present conspiracy and to show the intent with which the final acts were committed. Wharton on Criminal Ev., § 32; Greenleaf on Ev., § 111; 8 Cyc., pp. 677, 678, 684; *Swift v. United States*, 196 U. S. 395; *United States v. Greene*, 115 Fed. Rep. 344; *Lincoln v. Claflin*, 7 Wall. 132; *Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 598; *Moline-Milburn Co. v. Franklin*, 37 Minnesota, 137.

A person or corporation joining a conspiracy after it is formed, and thereafter aiding in its execution, becomes from that time as much a conspirator as if he originally designed and put it in operation. *United States v. Standard [12] Oil Co.*, 152 Fed. Rep. 294; *Lincoln v. Claflin*, 7 Wall. 132; *United States v. Babcock*, 24 Fed. Cas. 915, No. 14,487; *United States v. Cassidy*, 67 Fed. Rep. 698, 702; *The Anarchist*

Argument for Plaintiff.

Case, 122 Illinois, 1; *United States v. Johnson*, 26 Fed. Rep. 682, 684; *People v. Mather*, 4 Wend. 230.

The contract of February 24, 1898, being illegal and void, the defendant Creamery Company obtained no title to the letters patent sued on in the infringement suit brought by it against the plaintiffs herein, it having acquired such patents, if at all, by said illegal and void contract or the assignments executed pursuant to its terms and as a part of the same illegal scheme. *McMullen v. Hoffman*, 174 U. S. 639; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227; *Dunbar v. Am. Tel. & Tel. Co.*, 87 N. E. Rep. 521; *Thomson v. Thomson*, 7 Ves. 468; *Levy v. Kansas City*, 168 Fed. Rep. 524.

That the Creamery Company held assignments of the patents valid on their face will avail nothing; the court will look into the whole transaction. *McMullen v. Hoffman*, 174 U. S. 639.

The Creamery Company could not establish its cause of action in the infringement suit without relying on the illegal agreement, for it had to set up and prove its title to the patents sued on, and could only do this by bringing in the assignments which were a part of the illegal scheme. *McMullen v. Hoffman*, 174 U. S. 639; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227.

An interlocutory decree in a patent infringement suit, providing for an injunction and ordering an accounting and sending the case to a referee to ascertain the amount of damages, has no force as an adjudication in any other action. The decree must be a final decree to have such effect. The decree in the suit brought by the defendant Creamery Package Manufacturing Company against these [13] plaintiffs was only interlocutory. Further, the questions of monopoly, restraint of trade, and lack of title are new in this action, and were not litigated or at issue in the patent infringement suit, as shown by the pleadings in the patent infringement suit set forth in full in the complaint in this action. *Harmon v. Struthers*, 48 Fed. Rep. 260; *Ex parte National Enameling Co.*, 201 U. S. 156; *McGourkey v. Toledo & Ohio Ry. Co.*, 146 U. S. 536; *Smith v. Vulcan Iron*

Argument for Plaintiff.

Works, 165 U. S. 518; *Humiston v. Stainthrop*, 2 Wall. 106; *The Keystone Iron Co. v. Martin*, 132 U. S. 91; *Water Co. v. Hutchinson*, 160 Fed. Rep. 41; *Brush Electric Co. v. Western Electric Co.*, 76 Fed. Rep. 761; *Australian Knitting Co. v. Gormly*, 138 Fed. Rep. 92; *Roth Tool Co. v. New Amsterdam Casualty Co.*, 161 Fed. Rep. 709.

This conspiracy was a continuing offense; every overt act committed in furtherance thereof was a renewal of the same as to all of the parties. The statute of limitations does not begin to run until the commission of the last overt act. Neither can the parties claim a vested right to violate the law. 19 Am. & Eng. Enc. (2d ed.), "Limitations of Actions, *United States v. Green*, 115 Fed. Rep. 343; *Ochs v. People*, 124 Illinois, 399; *Spies v. People*, 122 Illinois, 1; 8 Cyc., p. 678.

It is an elementary principle of evidence that where two or more persons are associated together for some illegal purpose the acts or declarations of one of them in reference to the common object are admissible against them all. 1 Greenleaf, § 111; 2 Wigmore, § 1079; *American Fur Co. v. United States*, 2 Pet. 358; *S. C.*, 8 Curtis, 138; *Clune v. United States*, 159 U. S. 598; *Wiborg v. United States*, 168 U. S. 656.

A combination between two or more independent and competing corporations engaged in manufacturing and selling under letters patent and having an interstate trade and commerce, to eliminate the competition between [14] them and create a monopoly, is in violation of the Sherman Anti-Trust Act. *Blount Mfg. Co. v. Yale*, 166 Fed. Rep. 555; *National Harrow Co. v. Hench*, 83 Fed. Rep. 36; *S. C.*, 76 Fed. Rep. 667; *S. C.*, 84 Fed. Rep. 226; *Bobbs-Merrill Co. v. Strauss*, 139 Fed. Rep. 155; *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224; *National Harrow Co. v. Bement*, 47 N. Y. Supp. 462; *Mines v. Scribner*, 147 Fed. Rep. 927; *Bement v. National Harrow Co.*, 186 U. S. 70.

The court will not render its aid to the carrying out of a scheme prohibited by the Sherman Anti-Trust Act. *National Harrow Co. v. Hench*, 84 Fed. Rep. 226; *Continental Wall Paper Co. v. Voight*, 212 U. S. 227; *Levy v. Kansas*

Argument for Plaintiff.

City, 168 Fed. Rep. 524; *Northern Sec. Co. v. United States*; *McMullen v. Hoffman*; *Thomson v. Thomson*, *supra*.

Every combination resulting directly or necessarily in restraint of interstate trade is prohibited. It is immaterial what kind of a combination it is; none is exempt; a combination to prosecute law suits is as much prohibited as any other. See cases cited *supra*.

To wrongfully charge infringement is an actionable wrong. This is true apart from any claim of violation of Sherman Anti-Trust Act. (Also to say that a person has no patent, or valid patent.) *Culmer v. Canby*, 101 Fed. Rep. 195; 25 Cyc. 263; *Bowsky v. Cimiotti Unhairing Co.*, 76 N. Y. Supp. 465; *Watson v. Trask*, 6 Ohio, 531; *Cousins v. Merrill*, 16 U. C. C. P. 114; *Meyrose v. Adams*, 12 Mo. App. 329; 25 Cyc. 559; *Flint v. Hutchinson Burner Co.*, 110 Missouri, 492; *Germ Proof Filter Co. v. Pasteur Filter Co.*, 81 Hun. 49; *Wren v. Weild*, L. R. 4 Q. B. 731; *Swan v. Tappan*, 5 Cush. 104; *McElwee v. Blackwell*, 94 Nor. Car. 261; *Snow v. Judson*, 38 Barb. 210; *Dicks v. Brooks*, L. R. 15 Ch. Div. 22; *Barley v. Walford*, 9 Q. B. 197.

To take away plaintiff's customers by intimidation and threats renders defendants liable to damages under the Sherman Anti-Trust Act. *Loewe v. Lawlor*, 208 U. S. 274; *People's Tobacco Co. v. Am. Tobacco Co.*, 170 Fed. Rep. 896.

[15] Plaintiffs have a cause of action at common law. The Creamery Package Company not having any title to the patents it sued upon, had no right or authority to prosecute its suit. It is the same as where a person brings a suit in the name of another without any authority for so doing. The person so doing must be charged with knowledge of the kind of a title it had. 38 Cyc. 517; *Bond v. Chapin*, 8 Metc. 31; *Moulton v. Lowe*, 32 Maine, 466; *Foster v. Dow*, 29 Maine, 442; *Smith v. Hyndman*, 10 Cush. (Mass.) 554; *Streep v. Ferris*, 64 Texas, 12; *Hackett v. McMillan*, 112 Nor. Car. 513; *Metcalf v. Alley*, 24 Nor. Car. 38.

The contracts, conspiracy, and combination of the two defendant corporations are clearly illegal under both §§ 1 and 2 of the Anti-Trust Act and also at common law. *Continental Wall Paper Co. v. Voight & Co.*, 212 U. S. 227;

Argument for Plaintiff.

Standard Oil Co. v. United States, 221 U. S. 1; *United States v. Am. Tobacco Co.*, 221 U. S. 106; *Minnesota v. Creamery Package Co.*, 110 Minnesota, 415, 437; *S. C.*, 115 Minnesota, 207; *Peck v. Heurich*, 167 U. S. 624; *Thompson v. Thompson* (1802), 7 Ves. 468; *Hilton v. Woods* (1867), L. R. 4 Eq. 432; *Scott v. Brown* (1892), 2 Q. B. 724; *Clark v. Hagar* (1894), 22 Can. Sup. Ct. 510; *Power v. Phelan* (1884), 4 Derion (Quebec) 57; *Little v. Hawkins* (1872), 19 Grant Ch. (U. C.) 267 (Ontario); *Colville v. Small*, 22 Ont. L. Rep. 426; 19 Ann. Cas. 515, citing *Continental Wall Paper Co. Case*, *supra*; *Johnson v. Van Wyck*, 4 App. D. C. 294; *Gregerson v. Imlay*, 4 Blatchf. 503; 10 Fed. Cas. No. 5795; *Pinney v. First Nat. Bank*, 68 Kansas, 223; 75 Pac. Rep. 119; 1 Ann. Cas. 331; *Wehmhoff v. Rutherford*, 98 Kentucky, 91; 32 S. W. Rep. 288; *Gilroy v. Badger*, 27 Misc. Rep. 640; 58 N. Y. Supp. 392; *Gescheidt v. Quirk*, 66 How. Pr. 272; *Roberts v. Yancey*, 94 Kentucky, 243; 21 S. W. Rep. 1047; 42 Am. St. Rep. 357; *Miles v. Mutual Reserve Fund Life Ass'n*, 108 Wisconsin, 421; 84 N. W. Rep. 159; *Bryn[16]jolfson v. Dagner* (N. Dak.), 109 N. W. Rep. 320; *Burke v. Scharf* (N. Dak.), 124 N. W. Rep. 79; *Keiper v. Miller*, 68 Fed. Rep. 627 (affirmed in 70 Fed. Rep. 128; 16 C. C. A. 679).

A plaintiff cannot maintain an action for damages for infringement of letters patent, but his action must be dismissed, when he acquired the title to his cause of action and claim through a contract against public policy because champertous. 6 Cyc. 881, 882, 889; *Stewart v. Welch*, 41 Oh. St. 483.

No title to property can be acquired where the act of such acquisition is criminal, or prohibited by statute, or where the transfer is made as a part of, or a step in, or pursuant to, an act prohibited by statute or against public policy. *Pearce v. Rice*, 142 U. S. 28; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24; *Miller v. Ammon*, 145 U. S. 421; 20 Cyc. 937, 938, and cases cited; *Holman et al v. Ringo*, 36 Mississippi, 690.

The assignment or transfer of a negotiable security upon an illegal consideration is void, and confers no title to the

Argument for Defendants.

instrument on the assignee; and hence the maker of the note given upon a valid consideration, may defeat a recovery upon it by an assignee who won it at a game of cards. *Drinkall v. Movius State Bank*, 11 N. Dak. 10; 14 Am. & Eng. Ency. of Law (2d ed.), 647, 468; *Thomas v. First Nat. Bank*, 213 Illinois, 261; *Burke v. Buck*, 31 Nevada, 74; 99 Pac. Rep. 1078; 21 Ann. Cas. 625.

Without the active assistance of a willing court, the trust and unlawful object must have failed; with such assistance, it was perfected. A court will not lend its aid to the accomplishment of an unlawful object. *Peck v. Heurich*, 167 U. S. 624; *Graham v. LaCrosse &c. Co.*, 102 U. S. 148; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24; *Hoffman v. Bullock*, 34 Fed. Rep. 248; *Forker v. Brown*, 30 N. Y. Supp. 827; *Gruber v. Baker*, 20 Nevada, 472; 9 L. R. A. 308.

[17] The object and purpose of a trust must be legal. 28 Am. & Eng. Ency. of Law (2d ed.), 866, 867, and cases cited.

An association formed for an unlawful purpose cannot sue. 30 Cyc. 29.

A corporation cannot be formed for an unlawful purpose. 10 Cyc. 161, and notes.

It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly. *Pope Mfg. Co. v. Gormully*, 144 U. S. 238; *Minnesota v. Creamery Package Mfg. Co.*, *supra*.

Mr. Emanuel Cohen and *Mr. Amasa C. Paul*, with whom *Mr. John B. Atwater*, *Mr. Frank W. Shaw*, *Mr. George C. Fry*, and *Mr. W. A. Sperry* were on the briefs, for defendants in error:

The 1897 contract between the two defendants was not in restraint of trade, nor an attempt to create a monopoly.

In order to condemn an agreement as void under the act of July 2, 1890, its dominant purpose must be an interference with interstate or international commerce. *Cincinnati, &c. Packet Company v. Bay*, 200 U. S. 179; *Hop-*

Argument for Defendants.

kins v. United States, 171 U. S. 578, 592; *United States v. Joint Traffic Association*, 171 U. S. 505, 568; *Anderson v. United States*, 171 U. S. 604, 615; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 229; *Northern Securities Co. v. United States*, 193 U. S. 197, 381; *Field v. Barber Asphalt Co.*, 194 U. S. 618, 623; *Standard Oil Co. v. United States*, 221 U. S. 1, 66; *Union Pacific Coal Co. v. United States*, 173 Fed. Rep. 737.

The agreement of June, 1898, between the two defendants was not in violation of the Sherman Act.

Even if the Creamery Company were assumed to be a party to an unlawful combination in restraint of trade, this would not deprive it of its right to sue for infringement [18] ment of its patents. *Strait v. National Harrow Company*, 51 Fed. Rep. 819; *Connolly v. Union Sewer Pipe Company*, 184 U. S. 540. See also *Fritts v. Palmer*, 132 U. S. 282; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 190; *South Dakota v. North Carolina*, 192 U. S. 286, 311; *Harri-man v. Northern Securities Co.*, 197 U. S. 244, 291; *In re Metropolitan Railway Receivership*, 208 U. S. 90, 111; *International Harvester Co. v. Clements*, 163 Michigan, 55.

None of the contracts contained any provisions for bringing action against alleged infringers of patents for the purpose of driving them out of business.

The evidence did not warrant the jury in finding any agreement or conspiracy between the defendants to bring the patent suits for the purpose of driving the plaintiffs out of business.

The owner of a patent may notify infringers of his claims and warn them that unless they desist, suits will be brought to protect him in his legal rights. The only limitation on the right to issue such warnings is the requirement of good faith. *Kelly v. Ypsilanti Dress Stay Co.*, 44 Fed. Rep. 19; *Computing Scales Co. v. National Computing Scale Co.*, 79 Fed. Rep. 962; *Farquhar Co. v. National Harrow Co.*, 102 Fed. Rep. 714; *Adriance, Platt & Co. v. National Harrow Co.*, 121 Fed. Rep. 827; *Warren Featherbone Co. v. Landauer*, 151 Fed. Rep. 130; *Mitchell v. International &c. Co.*, 169 Fed. Rep. 145; 30 Cyc. 1054.

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There is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and they were promptly followed by the institution of the infringement suits.

The 1897 agreements had to be solely with the settlement of litigation then existing or apprehended, with the result that a large amount of litigation was settled, and the parties relieved from vexation and expense and enabled to proceed with their business. *Bement v. National Harrow Co.*, 186 U. S. 70, 93.

[19] None of the 1897 agreements was in restraint of trade.

The restraint of trade was not greater than the circumstances of the transaction required. *Cincinnati &c. Packet Co. v. Bay*, 200 U. S. 176; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423; *Whitwell v. Continental Tobacco Co.*, 126 Fed. Rep. 454, 461. Stipulations of the kind involved are frequent and valid. *Littlefield v. Perry*, 21 Wall. 205. They do not contravene public policy. *Warrington Co. v. Chicago &c. Co.*, 85 Fed. Rep. 786; *Rees v. Fenswick*, 140 Fed. Rep. 287, 288.

Nor was the June, 1898, agreement in restraint of trade.

The stipulations in the Owatonna Manufacturing Company agreements as to prosecuting infringers were usual covenants, nor warranting the inference of a purpose to drive competitors out of business by groundless suits. See collections of forms in Jones' Legal Forms, pp. 735, 739, 741; *Foster v. Goldschmidt*, 21 Fed. Rep. 70; *Macon Knitting Co. v. Leicester Con. Mille Co.*, 118 Fed. Rep. 844; *Willey v. New Standard Con. Co.*, 104 Fed. Rep. 421; *Critchler v. Linker*, 169 Fed. Rep. 658; *Jackson v. Allen*, 120 Massachusetts, 64; *The Fornoreek Mfg. Co. v. Burnum Wire Co.*, 63 Michigan, 198; *Croninger v. Paige*, 43 Wisconsin, 229; *Washburn & Moen Mfg. Co. v. Southern Fire Co.*, 37 Fed. Rep. 428.

The Owatonna agreements had to do wholly with manufacture, and were thus beyond the purview of the Sherman law. *United States v. Knight Co.*, 156 U. S. 1; *United States v. Northern Securities Co.*, 120 Fed. Rep. 721, 728;

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Diamond Glue Co. v. United States Glue Co., 187 U. S. 611, 616; *Cornell v. Coyne*, 192 U. S. 418, 428; *Loewe v. Lawler*, 208 U. S. 274, 297.

The Owatonna agreements had to do wholly with patented articles and were thus beyond the purview of the Sherman law. *Bement v. National Harrow Co.*, 186 U. S. 70, 91; *Henry v. Dick Co.*, 224 U. S. 1, 28.

The general agreement had for its purpose the prevention of ruinous competition in churns and the avoidance and settlement of litigation and did not constitute an undue restraint of interstate commerce within the Sherman law, nor does it show a design to drive competitors out of business by groundless suits. *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454; *United States v. Standard Oil Co.*, 173 Fed. Rep. 177.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 184.

The subsequent conduct of the Creamery Company in using names other than its own, and in acquiring other concerns, does not tend to show a design to drive competitors out of business.

The Creamery Company has never monopolized or attempted to monopolize any part of interstate commerce within the meaning of the Sherman Act. See Noyes on Corporate Relations, § 389, p. 711; *National Cotton Oil Co. v. Texas*, 197 U. S. 115.

Even if the Creamery Company had monopolized a substantial part of interstate commerce, no casual connection is shown between its acts and the damages claimed by plaintiffs. 21 Am. & Eng. Ency. (2d ed.), 480; 29 Cyc., 439.

An executed illegal contract carries title to its subject-matter in the same way as if the contract were legal, unless the law violated declares to the contrary. 15 Am. & Eng. Ency. 932; *McMullen v. Hoffman*, 174 U. S. 639; *Fritts v. Palmer*, 132 U. S. 282.

The Sherman law does not forbid the passage of title, but, on the contrary, impliedly sanctions it. *Connolly v.*

Argument for Defendants.

Union Sewer Pipe Co., 184 U. S. 540; *Harriman v. Northern Securities Co.*, 197 U. S. 244.

The executed illegal contract is given the same effect as respects the passage of title as would be given to a legal [21] contract of the same tenor and effect. *Strait v. National Harrow Co.*, 51 Fed. Rep. 819; *Edison Electric Light Co. v. Sawyer Mann Electric Co.*, 53 Fed. Rep. 592; *Soda Fountain Co. v. Green*, 69 Fed. Rep. 333; *Bonsack Machine Co. v. Smith*, 70 Fed. Rep. 383; *Saddle Co. v. Trozel*, 98 Fed. Rep. 620; *National Folding Box Co. v. Robertson*, 99 Fed. Rep. 985; *Otis Elevator Co. v. Geiger*, 107 Fed. Rep. 131; *General Electric Co. v. Wise*, 119 Fed. Rep. 922; *Fuller v. Berger*, 120 Fed. Rep. 274; *Motion Picture Patents Co. v. Laemmle*, 178 Fed. Rep. 104; *Motion Picture Patents Co. v. Ullman*, 186 Fed. Rep. 174; but see *contra*, *National Harrow Co. v. Quick*, 67 Fed. Rep. 130, which was affirmed on a different ground.

The plaintiffs suffered no damage by the successful prosecution of the suit against them.

The system of remedies applied in Federal courts does not permit a pending suit in equity to be used as a ground of recovery at law.

The plaintiffs are in fact prosecuting a suit for malicious prosecution in defiance of the rule that such a suit is not maintainable unless the primary suit has terminated in their favor.

Under the Sherman Act the injury counted on must be of a kind actionable at common law. The statute does not override the rules as to *damnum absque injuria*. *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454, 461; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 561; *Smith v. Wilcox*, 47 Vermont, 537, 545; *Hortenstine v. Virginia-Carolina Ry. Co.*, 102 Virginia, 914; *Connolly v. Western Union Telegraph Co.*, 100 Virginia, 51; *Tyler v. West. Un. Tel. Co.*, 54 Fed. Rep. 634; *Crescent Live Stock Co. v. Slaughter House Co.*, 120 U. S. 141, 147; 26 Oyc. 55.

According to the weight of authority and reason a suit for the malicious prosecution of a civil action is not maintainable unless there be an interference with person or property.

Argument for Defendants.

Willard v. Holmes, 142 N. Y. 492; *Burt v. Smith*, 181 N. Y. 1.

[22] The difference of opinion is stated and the cases collected in 21 Am. Law Reg. 281-353 (article by Lawson); 93 Am. St. Rep. 466-469 (article by Freeman); *McCormick Harvester Machine Co. v. Willan*, 63 Nebraska, 391; 4 Current Law, pp. 472-474 (article by Longsdorf); 19 Am. & Eng. Ency. 652, 653; 26 Cyc., pp. 14-16; *Wetmore v. Mellinger*, 64 Iowa, 741; *Dorr Cattle Co. v. Des Moines National Bank*, 127 Iowa, 153; *Smith v. Michigan Buggy Co.*, 175 Illinois, 619; *Potts v. Imlay*, 4 N. J. L. 377; *Luby v. Bennett*, 111 Wisconsin, 613; *contra*, see *Kolka v. Jones*, 6 N. Dak. 461; 71 N. W. Rep. 558; *Burnap v. Albert*, 4 Fed. Cas. 761 (No. 2170); *Cooper v. Armour* (C. C., N. Y.), 42 Fed. Rep. 215; *Bishop v. American Preservers Co.* (C. C., Ill.), 51 Fed. Rep. 272; *Wade v. National Bank of Commerce* (C. C., Wash.), 114 Fed. Rep. 377; *Tamblyn v. Johnston* (C. C. A., 8th Circ.), 126 Fed. Rep. 267, 270; *Wilkinson v. Goodfellow-Brooks Shoe Co.* (C. C., Mo.), 141 Fed. Rep. 218.

Even in jurisdictions where a suit may be maintained without interference with persons or property the want of probable cause must be very clearly proven. There is in this case no evidence at all of want of probable cause. *Eickhoff v. Fidelity, &c., Co.*, 74 Minnesota, 139; Bigelow, Torts, 78; Newall, Mal. Pros. 35; Cooley, Torts, 207; *Ferguson v. Arnov*, 142 N. Y. 580, 583.

Even if the prosecution of the Owatonna Manufacturing Company's suit constituted an actionable injury, such injury did not arise from anything forbidden or declared unlawful by the Sherman Act.

The complainants have waived their right to the penalty under the Sherman Act by bringing suit in the State court for malicious prosecution. *Etna Insurance Co. v. Swift*, 12 Minnesota, 437, 445; Ency. Pl. & Pr. 364; 15 Cyc. 260; *Robb v. Vos*, 155 U. S. 13; *Bierce v. Hutchins*, 205 U. S. 340, 346; *Klipstein & Co. v. Grant*, 141 Fed. Rep. 72; *Water Co. v. Hutchinson*, 160 Fed. Rep. 41.

[23] A patent owner may notify infringers of his claims and threaten them with a suit unless they desist. If he

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does this in good faith, believing his claims to be valid, and brings his suit with reasonable diligence he is acting within his rights and incurs no liability. There is no evidence of bad faith in the record. *Kelley v. Ypsilanti Mfg. Co.*, 44 Fed. Rep. 119; *Computing Scale Co. v. National Scale Co.*, 79 Fed. Rep. 962; *Farguhar Co. v. National Harrow Co.*, 102 Fed. Rep. 714; *Adrianse, Platt & Co. v. National Harrow Co.*, 121 Fed. Rep. 827; *Warren Featherbone Co. v. Landauer*, 151 Fed. Rep. 180; *Dittgen v. Racine Paper Goods Co.*, 164 Fed. Rep. 84; *Mitchell v. International, &c., Co.*, 169 Fed. Rep. 145.

The warnings considered as a separate cause of action were barred by the statute of limitations. *Chattanooga Foundry Co. v. Atlanta*, 203 U. S. 390; *Huntington v. At-trill*, 146 U. S. 657, 608; *Brady v. Daly*, 175 U. S. 148, 155, 156.

There is nothing in the evidence to show that either of the defendants had any improper or unlawful connection with the infringement suit brought by the other.

A combination to bring suits is not within the Sherman Act.

The public is not entitled to competition among patent owners or licensees, and therefore combinations relating to United States patents are not within the Sherman Act. *Northern Securities Co. v. United States*, 193 U. S. 197, 331; *Board of Trade v. Christy Grain Co.*, 198 U. S. 236, 252.

If the Sherman Act applies to combinations among patent owners, the patentee's power of assignment is limited, and to that extent his exclusive rights are destroyed.

Patent owners may lawfully secure for themselves, through a combination of their patents, a traffic, however extensive, in unpatented articles. *Henry v. A. B. Dick Company*, 224 U. S. 1.

[24] Mr. Justice McKenna delivered the opinion of the court:

Action for the recovery of damages in the sum of \$406,881.60, being the total of certain specific items mentioned in the complaint, and for all other damages sus-

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tained by plaintiffs (so designated throughout this opinion) by virtue of the facts stated, including all sums that they are entitled to under the provisions of the Anti-Trust Act of 1890, July 2, 1890, 26 Stat. 209, c. 647, together with an attorney's fee. The grounds of recovery are set forth in the complaint, which, inclusive of exhibits, occupies 150 pages of the record, and seems to make impossible any attempt at brevity or condensation. The case, however, is not in wide compass and attention may be concentrated upon certain considerations. The contention of plaintiffs in its most general form is that the defendants entered into a conspiracy or combination in restraint of interstate trade and in execution of it, plaintiff's interstate business was destroyed by defendants wrongfully prosecuting two suits against them for the infringement of patents under which the articles of their trade were manufactured and by circulating slanders and libels to the effect that such articles were infringements of defendants' patents. A cause of action is hence asserted under § 7 of the Anti-Trust Act. The section is as follows:

Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

To justify recovery, therefore, injury must result from something forbidden or made unlawful by the act, and [25] what is forbidden or made unlawful is expressed in §§ 1 and 2. Section 1 is as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

The acts forbidden are made a misdemeanor. And by § 2 it is also made a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize, any part of the trade or commerce among the several States, or with foreign nations."

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The question occurs, Do the facts of the case show a breach of the law by defendants and injury resulting from it to plaintiffs? The following facts are alleged: On the 24th of February, 1898, or just prior thereto, certain corporations, and one partnership were engaged in making or selling creamery supplies, including combined churns and butter workers, and transporting them in State and interstate commerce. All of the corporations and the partnership were in direct competition in their lines of business and as the result of it all of the articles manufactured and sold by them were sold at no more than a fair price and legitimate profit. The corporations controlled over 90 per cent of the business of manufacturing and selling creamery and dairy supplies in the States of Michigan and Indiana and in all the States west and in some of the States east thereof, manufacturing the articles in one or more of the States and shipping by the same common carriers from the States where manufactured to other States and distributing and selling such articles there.

On the 24th of February, 1898, the Creamery Package Manufacturing Company, one of the corporations, and its stockholders, then engaged in the manufacture and sale of dairy and creamery supplies but not of [26] combined churns and butter workers, it being as to the latter only the agent for their sale, entered into a contract with the other corporations and the partnership by which it was agreed to increase the capital stock of the Creamery Package Manufacturing Company to enable it to purchase the property and business of the other corporations parties to the contract, including in the property all patents and applications for patents.

The contract is very elaborate and verbose, but we need not give its particular covenants, as no point is made upon them, it being only alleged and contended that its purpose and effect were that the Creamery Package Manufacturing Company should acquire the property and business of the other corporations, and that while the latter should cease to exist they should be represented as continuing as separate and independent concerns and competitors in the market

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with the Creamery Package Manufacturing Company and with one another, while in truth and fact there would be no competition between them.

It is alleged that in execution of the purpose of the contract traveling men from the different houses under instructions from the Creamery Package Manufacturing Company met and secretly arranged the bid each should interpose, determining by lot and other ways who should interpose the lowest bid and who the highest.

The Owatonna Company was not a party to that contract, but it is contended that it participated in or is brought into the scheme and purpose of the contract by certain agreements entered into by it with the Creamery Package Manufacturing Company. They are all attached to the complaint as exhibits and may be described as transferring certain patents or the right to use certain patents to the Creamery Package Manufactur-[27]ing Company. A brief summary of them is given in the margin.*

*The first of the agreements between the companies was made April 19, 1897 (that was before the contract of Feb. 24, 1898), and recited that the Owatonna Company was the owner of certain patents covering combined churns and butter workers and was manufacturing the same, and that as the Creamery Package Manufacturing Company was desirous of handling the same as sole agents, the agreement was made. It conveyed five patents issued between January, 1893, and August, 1896, and applications for another. There were provisions as to the size, material, and other details; also as to royalties to be paid to the Disbrow Manufacturing Company. And the Owatonna Company agreed to protect the Creamery Package Manufacturing Company from all suits for infringement of the patents or claims for damages arising out of the sales of the churns and promptly and vigorously to attack infringers and to procure patents on all improvements made by it or by any person in its behalf.

There was an addition to the contract made June 4, 1897, in regard to the repair parts of the "Winner" churns and the repair and perfection of the same, and the rebate from the billing price.

On January 12, 1898, a supplemental contract was made by the same parties as to the disposition of the royalties received under a license contract made September 30, 1897, with the Cornish, Curtis & Greene Manufacturing Company, of Fort Atkinson, Wisconsin.

On June 4, 1898, another agreement was made between the parties which referred to the agreement of April, 1897, and to the pendency of litigation based on the infringement or charges of infringement of the patents with which that contract was concerned. For the purpose

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[28] It is alleged that on July 8, 1894, the Creamery Package Manufacturing Company and the Owatonna Company brought suit separately in the Circuit Court of the United States for the First Division of the State of Minnesota, at Winona, against the plaintiffs, charging infringe-

of adjusting all claims growing out of such infringement and settling the litigation between the Owatonna Company and F. B. Fargo & Co., whose rights the Creamery Package Manufacturing Co. had acquired, it was agreed that one of the suits which was named, and in which proofs had been taken, should be brought to a speedy hearing and all other suits dismissed.

The Creamery Package Manufacturing Company agreed not to manufacture the machine known as the "Winner" or the "Disbrow," both referred to in the contract of April, 1897, called the "sales contract," or any other of a described kind made by the Owatonna Company, but was at liberty to manufacture and sell churns and butter workers of any other construction. Satisfaction of all royalties, damages, and costs was agreed on.

The sales contract was continued in force and there was added to it a provision entitling the Owatonna Company to furnish 55 per cent in value at list price of the churns and butter workers sold by the Creamery Package Manufacturing Company in each year after the date of the contract. If less than that per cent should be made and furnished by the Owatonna Company, certain sums were provided to be paid by the other company. And the latter company agreed not to discriminate against the machines manufactured by the Owatonna Company in favor of machines of its own manufacture or of other manufacturers, and that it would give to the machines of the Owatonna Company the same effort and energy to effect their sale. The Owatonna Company agreed to protect the patents and prosecute infringers and give assistance to the Creamery Package Manufacturing Company in the prosecution of infringers. Permission was given to the Owatonna Company to use the "Disbrow" and "Winner" churns owned by the Creamery Package Manufacturing Company or to be acquired by it. There was also an agreement made on the 4th of June, 1898, between the parties in settlement of claims on account of the use of patents with certain other parties besides F. B. Fargo & Co., whose business the Creamery Package Manufacturing Co. had acquired. There was a provision for paying royalties to the Disbrow Co., with other details not necessary to mention.

On January 1, 1903, another agreement was entered into between the parties which disposed of and adjusted rights and contentions as to patents for a machine called a pasteuriser and cream ripener. By an agreement made January 1, 1903, the prices provided for in the sales contract were changed in certain particulars.

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ment of patents for churns and butter workers. The bills in the suits are attached to the complaint in this action and are in the usual form. Process was issued and the plaintiffs here answered. Upon proofs taken a decree was entered in favor of plaintiffs and against the Owatonna Company in the suit brought by it. It is not alleged in the complaint but it is in the answer of the Creamery [29] Package Manufacturing Company and not denied that it obtained a decree adjudging plaintiffs here infringers of the patents which were the subject of the suit.

It is alleged that the defendants here conspired with one another to commence and prosecute the suits and that they were commenced and prosecuted maliciously and without probable cause, whereby plaintiffs were caused certain items of damages.

The other allegations of the complaint need not be repeated in detail. They are to the effect that the contract of February 24, 1898, was made in violation of law to restrain State and interstate trade and commerce and that all that was done under it was in pursuance and execution of that purpose, including the suits brought against plaintiffs by the Owatonna Company and the Creamery Package Manufacturing Company for the infringement of patents. That prior to the bringing of these suits plaintiffs had a good and established trade and market for their churns and were manufacturing and shipping them in the States of Wisconsin, Iowa, and South Dakota, and knowing this and fearing that such trade would be continued in those States and be extended to other States, defendants commenced the suits for infringement, and prior thereto and since have written letters and talked to purchasers and prospective purchasers of plaintiffs' churns, threatening lawsuits and actions for damages for infringement of the patents described in the bills and also threatened suits for injunction, and by this means destroyed plaintiffs' State and interstate trade.

That plaintiff D. E. Virtue and one Martin Deag were the first joint inventors of a churn and butter worker and that a patent was issued therefor, No. 634,074, under which they manufactured those articles and sold them in State and

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interstate commerce except as they had been prevented by the suits brought against them as hereinbefore stated. And by elaborate allegations the patents upon [30] which those suits were brought are attacked for want of invention and novelty.

That the Creamery Package Manufacturing Company has purchased the property and business of other competitive concerns and that it has had during the last several years contracts with many and numerous dealers in the articles sold by which it required them to purchase such goods exclusively of it at certain fixed and maintained prices and to sell only in certain designated territory, the object of which is to secure a monopoly to the Creamery Package Manufacturing Company and to restrain interstate commerce. That all of the acts detailed were done in pursuance of a common scheme and conspiracy on the part of all of the defendants during the years 1897 and 1898 and ever since maintained and carried out, limiting the production of creamery supplies, fixing and determining their prices, restraining trade in them and monopolizing over 90 per cent of their production and sale, of which prior to one year before the bringing of this action plaintiff had no knowledge or notice except the two suits in equity and the contract by which Virtue and Deeg transferred to the Creamery Package Manufacturing Company the exclusive right to manufacture the churn and butter worker under patent No. 684,074 for the period of three years. That they did not know that that contract was procured as part of the schemes of defendants. That they were at no time parties to acts of defendants and did not know of the wrongful contracts and combinations until after the time limited to take the testimony in the two equity suits.

The defendants answered the complaint, admitting some of its allegations and denying others. They alleged performance of the contract between the Creamery Package Manufacturing Company and the plaintiff Virtue and said Deeg and opposed to the charges of the complaint certain affirmative matters, including two actions brought in the State court.

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[§1] A jury was empaneled to try the issues which, under the instructions of the court, found a verdict for defendants upon which a judgment was duly entered. It was affirmed by the Circuit Court of Appeals, 179 Fed. Rep. 115.

The Circuit Court and the Circuit Court of Appeals both decided that the damages which plaintiffs alleged they sustained were not a consequence of a violation by defendants of the provisions of the Sherman Anti-Trust Act. Both courts assumed for the purpose of their decision that the contract of February 24, 1898, between the Creamery Package Manufacturing Company and the other manufacturers and sellers of churns and butter workers was a combination in restraint of trade, but both courts held that the Owatonna Company was not a party to it nor became associated subsequently in its scheme.

Of the infringement suits the Court of Appeals said they exhibited "a case where two suits are brought, one by a party to a lawful agreement, the other by a party to an unlawful agreement, for the infringement of patents owned by them, respectively, and where both parties were doing no more than exercising their legal rights." And the court declared in effect that it could see no sinister significance in the suits being simultaneous; and said, further, that after a thorough examination of the record it agreed with the Circuit Court that there was no evidence offered at the trial "which would warrant the jury in finding that any agreement of that kind existed."

The plaintiffs attack this conclusion in twenty-one propositions, some of which are of very broad generality, and all, counsel contend, are supported by the decisions of this and other courts. It is quite impossible to consider them in detail without a review and repetition of the cases. The view we take of the case makes this unnecessary. The case is, as we have said, in narrow compass. The complaint charges a violation of the Sherman Act, and, as a means of accomplishing its purpose, the destruction of [§2] plaintiffs' interstate trade by a malicious litigation of their rights. A necessary element of the charge is the coöperation of at least the corporate defendants in the purpose, and this determines our inquiry. In answering it we shall assume,

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as the lower courts assumed, that by the contract of February, 1898, the Creamery Package Manufacturing Company and the corporations competing with it entered into a combination offensive to the law. Did the Owatonna Company participate in it or subsequently join it or coöperate to execute its purposes? The question must be answered in the negative, as we shall proceed to show.

The Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, which articles it sold throughout the United States, and by the contract of April 19, 1897, it constituted the Creamery Package Manufacturing Company its sales agent of them, the latter company not making churns and butter workers. The contract was a perfectly legal one and preceded by some time the agreement of the 24th of February, 1898, entered into between the latter company and other corporations. There were contracts between the Creamery Package Manufacturing Company and the Owatonna Company subsequent to the latter date, but all of them were supplemental to the first one and had no illegal taint, nor did they affect it with illegal taint. It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights, but this was no violation of law. The owner of a patent has exclusive rights, rights of making, using and selling. He may keep them or transfer them to another—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in *Standard Sanitary Manufacturing Company v. United States*, 226 U. S. 20. But [33] patents are not so used when the rights conferred upon them by law are only exercised. The agreement of the nineteenth of April, 1897, constituted, as we said, the Creamery Package Manufacturing Company a sales agent of the churns and butter workers made by the Owatonna Company and fixed their list price. The patents under which the articles were manufactured were stated, and it was provided that the Owatonna Company should protect the Creamery Package Manufacturing Company from all suits

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for infringement, defend the validity of the patents and promptly attack infringers. This provision is especially urged by plaintiffs as showing a common and illegal purpose between the companies. It has not that quality. It is but an assurance of title to the rights conveyed.

But it is said that the contract between the companies dated June 4, 1898, exhibits knowledge by the Owatonna Company of the Creamery Package Manufacturing Company's purpose, and "fitted into the scheme of the two defendant corporations to get a monopoly in the United States"; and this, it is said further, "can only be when all of the doings * * * are looked at as a whole from beginning to end." We can not concur. We have seen that the contract of June 4, 1898 (inserted above in the margin), was but a settlement of claims growing out of reciprocal charges of infringement and it has no other connection with the agreement of February, 1898, than that some of the claims were against corporations which were parties to that agreement. It would be far-fetched to say that the Owatonna Company could not assert rights or protect rights because they were asserted or sought to be protected against corporations which had become members of an illegal combination without participating in the guilt of such combination and becoming a joint conspirator in its purposes. But it may be said that we are considering the transactions isolatedly and ignoring [34] their combined effect. That indeed would be a fault, but in order to compute their combined effect we must estimate what strength they have separately, and so far, on the face of the contracts, there is nothing to inculcate the Owatonna Company.

But a united purpose is sought to be established between it and the Creamery Package Manufacturing Company by the testimony of witnesses to the effect that the contract of April 19, 1897, between the Dishrow Manufacturing Company and the Owatonna Company was urged by the president of the Creamery Package Manufacturing Company, who represented that the acceptance of royalties by the Dishrow Company was better than a continuance of competition. It is not practicable to give all the

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testimony of what preceded and induced that contract. The part most relevant to our inquiry is that which related to the competition which existed between the companies. A witness, who was president of the Owatonna Company at the time, testified that it was suggested to him and other officers of the company by Mr. Gates, president of the Creamery Package Manufacturing Company, that a settlement ought to be brought about by letter or otherwise with the Disbrow Manufacturing Company "so as to get the two churns which were then being manufactured together," and stated that he (Gates) had had some conferences with the Disbrow Company, and he thought that if the officers of the Owatonna Company would go to Mankato "there might be an arrangement made whereby that business could be brought in connection with ours, and in that way eliminate the competition that at that time existed between the Owatonna Manufacturing Company and the Disbrow Manufacturing Company." This object was expressed by the witnesses in different ways.

The president of the Disbrow Manufacturing Company testified that Gates urged that the Disbrow Company should "stop manufacturing and make a contract with [35] the Owatonna Manufacturing Company, and let them have all our patents on combined churns and butter workers and other things, and combine the whole business under one head, and let them do all of the manufacturing." The witness testified that he at first rejected the proposition and resented the manner in which the proposal was made, Gates going so far as to declare, with a profane accompaniment, "You will do it or we will put you out of business." But subsequently negotiations were resumed and the president of the Creamery Package Manufacturing Company explained that he wanted matters settled, litigation stopped, "and a new arrangement made so that the whole thing should be run under one head and one control," and in that way "control the whole churn business." The witness formulated the terms, which resulted, after some days of negotiation, in the contract of April 19, 1897. But during the negotiations the witness did not see the Owatonna Company's representatives until they reached the point of signing the contract.

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These declarations seem to be very arbitrary and unjustifiable when standing alone and to have had no other purpose than the ruthless crushing of a competitor in the same line of business. They take on another character, or rather the object of the negotiations and the contracts which resulted from them, take on another character, when all the testimony is considered. It will be observed from the date of those negotiations and of the contracts that they preceded by nearly a year the contract between the Creamery Package Manufacturing Company and its competitors and could have had no relation to it. And, besides, they had a natural and adequate inducement. They were an adjustment of disputes and litigation growing out of a contract between the Disbrow Company and the Owatonna Company concerning the very same patents. In one suit the Owatonna Company was plaintiff against the Disbrow Company; in another suit the latter [36] company was plaintiff against the Owatonna Company, and both suits were based on disputes as to rights or obligations arising from the contract of October 2, 1893. The testimony also shows some controversy between the Creamery Package Manufacturing Company and the Disbrow Company in regard to other patents, but the effect of it is not easy to estimate. There was also a contract entered into between the Disbrow Company and the Creamery Package Manufacturing Company on the nineteenth of April, 1897, settling matters growing out of a contract between those companies made on the twelfth of October, 1896, by which the Disbrow Company made the Creamery Package Manufacturing Company its exclusive sales agent for churns and butter workers and mortgaged to the latter company its plant. The other provisions of the contract concern the adjustment of the relations between all of the companies under the contemporaneous contracts, and need not be stated in detail. It is clear, then, as we have already said, that what transpired on the nineteenth of April, 1897—negotiations and contracts—had no relation to the contract of February, 1898, and had for their inducement and object the settlement of controversies and rights growing out of the contract of October 2, 1893, between the

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Disbrow Company and the Owatonna Company, and that of October 12, 1896, between the Disbrow Company and the Creamery Package Manufacturing Company and the proposition of the latter company to become the sales agent of the churns made by the Owatonna Company. All of this is very complicated in the statement, but is simple enough in the results, and can be definitely estimated as to actual and legal effect. We may therefore sum up by saying that the Disbrow Company, by its contract with the Owatonna Company, did nothing more than confirm or enlarge the rights which the Owatonna Company had obtained, by the contract of 1893, and conveyed to it the exclusive right [37] in the patents for certain named royalties. This was no violation of law. The Owatonna Company did nothing more in its contract with the Creamery Package Manufacturing Company than to make that company its exclusive sales agent, and this was no violation of law. Both contracts had natural and adequate legal inducements and conveyed rights that could under the law be conveyed, and, as a necessary incident to the conveyance, one only of the parties could thereafter exercise them. It may be that the Disbrow Company was to an extent in competition with the Owatonna Company, but it was a competition in part, at least, which, it was contended, was illegally conducted against rights which had been transferred in 1893. But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture or of sale is not one condemned by law.

It is, however, urged that the infringement suits brought by the Creamery Package Manufacturing Company and the Owatonna Company against plaintiffs were provided for by the contracts between the Owatonna Company and the Disbrow Company, and their coincidence in time is urged as proof of concerted action on the part of defendants and of a conspiracy to destroy plaintiffs' business. The contention is that the bringing of those suits was not a single and isolated act but was a part of the more comprehensive plan and scheme to secure a monopoly in the United States of the business of making and selling cream-

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ery supplies, or, more accurately, counsel say, to continue and maintain the monopoly already acquired. And it is contended that the attempt was successful in that it destroyed plaintiffs' business. That these contentions are untenable we have demonstrated. The contracts we have shown were legal conveyances of rights, and the provision for the prosecution of infringement suits was but an assurance of those rights. Patents would be of little [38] value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights, or asserted rights, may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-Trust Act for the violation of the provisions of that act, seeking treble damages. This, indeed, plaintiffs take special pains to allege, that there may be no confusion about the right or grounds or extent of recovery. The testimony shows that no wrong whatever was committed by the Owatonna Company, and the fact that it failed in its suit against plaintiffs does not convict it of any.

This is enough to dispose of the case, for the foundation of the complaint is that the defendants entered into a contract or combination in restraint of trade which caused damage to plaintiffs; and the guilt of the individual defendants and of the two corporations and of all of their officers, servants, and stockholders is very carefully alleged. It was in this aspect that the case was tried.

But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute, and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court nor was it made in the Circuit Court of Appeals. The case was tried and ruled upon, as we have seen, on the ground of the coöperation of the defendants in a scheme of monopoly and restraint of trade. There was no liability asserted in the Circuit Court or in the Circuit Court of Appeals against one of the defendants separately

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from the others. Concert and coöperation was asserted against all and a ruling was not invoked as to the separate liability of either. One Frank LaBare was a party defendant, and as to him plaintiffs made a motion that "the case be dismissed and dropped." The court denied the [39] motion for some reason, and then plaintiffs' counsel said, "We desire to proceed with the case as against the defendants, the Owatonna Manufacturing Company and the Creamery Package Manufacturing Company." The plaintiffs then offered to prove that they had not infringed the patents sued on by the defendants. It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time.

There are twenty-seven errors assigned upon offers of testimony excluded or upon other rulings of the Circuit Court. These we have examined and find that in the view taken by the courts below of the case and that which we take, there was no error of substance committed.

Judgment affirmed.

STRAUS ET AL. v. AMERICAN PUBLISHERS' ASS'N
ET AL.*

(Circuit Court of Appeals, Second Circuit. December 9, 1912.)

[201 Fed. Rep., 306.]

PLEADING (§ 305)—PROPERT—JUDGMENT.—By the propret of the judgment in a cause in the State court, made by the answer pleading it as *res judicata*, the record of such cause becomes part of the pleading, so that the court may, and is bound to, inspect it as such; it not being required to be annexed as an exhibit to the answer, and testimony or affidavits not being necessary.³

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 910-917; Dec. Dig. § 305.]

* For opinion of the Supreme Court in a similar case (231 U. S., 222), see *post*, page 842.

³ Syllabus copyrighted, 1913, by West Publishing Company.

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JUDGMENT (§ 714)—RES JUDICATA—IDENTITY OF SUBJECT-MATTER.—

The combination complained of is not a new one, or different from that complained of in a former suit, judgment in which is pleaded as *res judi* [§ 807] *cata*, because after such suit defendants modified it by eliminating part of its scope.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1240, 1242, 1243; Dec. Dig. § 714.]

JUDGMENT (§ 663)—RES JUDICATA—PENDENCY OF APPEAL.—Pendency of an appeal from a judgment does not interfere with its operation as *res judicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1174; Dec. Dig. § 663.]

JUDGMENT (§ 828)—RES JUDICATA—MATTERS CONCLUDED.—The same matters being complained of in a suit in the State court and a subsequent one in the Federal court, the fact that the judgment in the State court depended on the State statutes, and that the complaint in the second suit is founded on the Federal statute, which is not within the jurisdiction of the State court, is immaterial as regards the judgment being *res judicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1504-1509; Dec. Dig. § 828.]

Conclusiveness of judgment as between Federal and State courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

JUDGMENT (§ 660)—RES JUDICATA—ERRONEOUS JUDGMENT.—The question involved being one the court was competent to decide, the fact that it may have decided erroneously is immaterial as regards its judgment being *res judicata*.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1171; Dec. Dig. § 660.]

JUDGMENT (§ 701)—RES JUDICATA—PARTIES—PRIVIES.—The judgment in a suit against corporations and an association is none the less *res judicata* because of the addition as parties to the second suit of persons who were officers of the association at its organization, and members and officers of the corporations, and took part in organizing the combinations complained of, and were included in the injunction issued in the first suit; they being privy thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1226; Dec. Dig. § 701.]

JUDGMENT (§ 590)—RES JUDICATA—IDENTITY OF ISSUES.—That the second suit seeks damages for a longer period than the first is immaterial as regards the judgment in the first being *res judicata*; the thing adjudicated being that plaintiff could recover no damages for the combination complained of, whatever its period.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1035, 1063, 1064, 1102-1106; Dec. Dig. § 590.]

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In error to the Circuit Court of the United States for the Southern District of New York; E. Henry Lacombe, Judge.

Action by Isidor Straus and others against the American Publishers' Association and others. Defendants had judgment on the pleadings, and plaintiffs bring error. Affirmed.

See, also, 178 Fed. 586.

Wise & Seligsberg, of New York City (*E. E. Wise* and *Wallace Macfarlane*, both of New York City, of counsel), for plaintiffs in error.

S. H. Olin, of New York City, for defendants in error.

Before COXE, WARD, and NOYES, Circuit Judges.

[308] WARD, Circuit Judge.

October 1, 1909, the plaintiffs began this action at law to recover treble damages against the defendants under the Federal Anti-Trust Law of July 2, 1890. The complaint alleges that the defendants, publishers of books, combined to organize a membership corporation under the laws of New York called the American Publishers' Association, of which they were members and which included a majority of the publishers in the United States, and of which the other defendants were the directors for the first year and also officers or directors of defendant corporations; that the purpose of the association was to maintain the retail price of copyrighted books and was to be effected by an agreement of the publishers to sell their books, copyrighted or uncopyrighted, only to such dealers as would maintain the net retail price of the copyrighted books; that in further prosecution of the combination the defendants aided the organization of a voluntary unincorporated association to coöperate with the Publishers' Association, called the American Booksellers' Association, which included a majority of the booksellers of the United States; that the purpose of this organization was to bring about an agreement between the booksellers to maintain the retail price of the publishers' copyrighted

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books by refusing to sell the books, copyrighted or uncopyrighted, of any publisher who declined to support the combination, and by refusing to sell any books at less than the usual retail price to any bookseller who cut the retail price of the publishers' copyrighted books; that these combinations went into operation May 1, 1901, and have been continued ever since, contrary to the provisions of the Anti-Trust Law of July 2, 1890, except that in about the month of March, 1904, the Court of Appeals of the State of New York (177 N. Y. 473, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819), in an action brought against the defendants herein and others, having declared the foregoing agreements unlawful so far as uncopyrighted books were concerned, the Publishers' Association and Booksellers' Association modified the said agreements so as to exclude uncopyrighted books, but continued the same illegal combination and conduct in respect to copyrighted books; that because the plaintiffs refused to conform to the regulations of these combinations they were put on a cut-off list, their business followed up by detectives, and their supply of books cut off, to their damage in the sum of \$125,000.

The answer of the defendants contained, among other things, a separate defense to the effect that the plaintiffs had brought an action in equity in the Supreme Court of the State of New York, December 3, 1902, against them (except defendants Scribner, Scott, Britt, Putnam, Harvey, and Appleton, who were trustees and officers of certain of the defendants) for the same cause of action in which the defendants (except the defendants aforesaid) appeared, and in which it was so proceeded that the said agreements were held invalid as to uncopyrighted books and valid as to copyrighted books, and an interlocutory judgment was entered May 20, 1909, restraining the defendants from interfering in any way with the purchase by the plaintiffs of uncopyrighted books, and directing the plaintiffs' damages to be ascertained [309] by a referee, which judgment was on appeal affirmed by the Appellate Division and by the Court of Appeals. The referee having subsequently ascertained the damages; final judgment was entered on his re-

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port for \$3,675.60 damages and costs, from which judgment the plaintiffs appealed to the Court of Appeals, which affirmed the same. Thereupon they took a writ of error to the final judgment of the Supreme Court of New York, which is now pending in the Supreme Court of the United States. The said judgment was pleaded as *res adjudicata* of all the matters complained of, and profert of the same was made.

The plaintiffs replied to this defense that the judgment in the State court was not *res adjudicata*, and that the cause of action was not the same as that in the action in the State court, because damages in respect to copyrighted books was excluded in the latter action, because the present action was founded on the Federal statute, under which the State court had no jurisdiction, because there were additional parties in this action, and because different periods of time were covered.

The defendants having moved for judgment on the pleadings, Lacombe, Circuit Judge, granted the motion and dismissed the complaint.

[1, 2] The first contention of the plaintiffs in error is that the record of the cause in the State court should not have been inspected by the circuit judge, because it was not annexed as an exhibit to the answer. This is a very technical objection, especially in view of the fact that the action was referred to by the plaintiffs themselves in their complaint. It would prove a cumbersome practice to load such records upon pleadings. By the profert the record became a part of the pleading and the court was bound to inspect it as such. That is the practice in this circuit (*Bogart v. Hinds* [C. C.], 25 Fed. 484); and there is abundant authority elsewhere (*American Bell Tel. Co. v. Southern Tel. Co.* [C. C.], 34 Fed. 803; *Dickerson v. Greene* [C. C.], 53 Fed. 247; *Germain v. Wilgus*, 67 Fed. 597, 14 C. C. A. 561; *Heaton v. Schlochtmeier* [C. C.], 69 Fed. 592). No testimony or affidavits were necessary. The pleadings show that the agreements and conduct complained of in the action in the State court are exactly the same as those complained of in this action, except that, as the plaintiffs themselves have

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alleged in the complaint, the agreements have been modified since the decision in the Court of Appeals in one particular, viz, so as to confine them entirely to copyrighted books. The combination after this modification was in no sense a new combination.

Reliance is also placed upon the refusal of the Supreme Court in *Pacific Railroad of Missouri v. Missouri Pacific Railway*, 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498, to consider the record of a case referred to in the bill. That was a demurrer to the bill, and the Supreme Court said the record of the case mentioned could not be considered because it was not certified to the Supreme Court as part of the record in the Circuit Court. In this case, however, the transcript of the record of the cause in the State court on writ of error to the Supreme Court of the United States is a part of the record and contains the judgment roll of the State court, stipulated by the parties to be correct and certification waived.

[310] [3] The point is also made that the judgment was not res adjudicata because of the appeal pending to the United States Supreme Court. This fact does not suspend the operation of the judgment as an estoppel, *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384; *Deposit Bank v. Frankfort*, 191 U. S. 499, 510, 24 Sup. Ct. 154, 48 L. Ed. 276; Freeman on judgments, § 328.

[4,5] The fact that the judgment in the State court depended upon the State statutes and that the complaint in this case is founded on the Federal statute, which is not within the jurisdiction of the State court, makes no difference. The plaintiffs, having the option to go into either court, chose the State court, and their claim, having been there adjudicated, can not be presented the second time to any other court. *Olabaugh v. Southern Wholesale Grocers Association* (C. C.) 181 Fed. 706. It may be admitted that the State court erroneously held, in view of the subsequent decision of the Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, that the agreements complained of were valid so far as copyrighted books were concerned, and that therefore as a mat-

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ter of law the plaintiffs could not recover damages in respect to them at any time. Still this question was actually involved in the cause before the State court, which was competent to decide it. Having done so, its judgment is binding in any subsequent action between the same parties for all time. *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195. If the plaintiffs are entitled to any relief, they can obtain it only in the original action.

[6] The judgment in the State court is not prevented from being a bar because of the additional parties in this court. They were officers of the Publishers' Association at its organization, were members and officers of the defendant corporations, took an active part in organizing the combinations complained of, were included in the injunction issued in the State court action, and were so stated to be in the complaint in this court. They must be regarded as privy to that action.

[7] The fact that evidence of damages in this action may cover a longer period of time than was covered by the action in the State court is immaterial. The thing that was adjudicated between the parties in the State court was that the plaintiffs could recover no damages in respect to copyrighted books at all, be the period of the combination long or short.

The decree is affirmed.

STRAUS AND STRAUS, COMPOSING THE FIRM,
OF R. H. MACY & COMPANY, v. AMERICAN PUBLISHERS' ASSOCIATION.*

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

(No. 19. Argued March 7, 1913.—Decided December 1, 1913.)

[231 U. S., 222.]

One who sets up a Federal statute as giving immunity from a judgment against him, may bring the case here under § 709, Rev. Stat., now § 237 of the Judicial Code, if his claim is denied by the decision of the State court.^b

* For opinion in a similar case (201 Fed. 306), see *ante*, page 838.

^b Syllabus and statements of arguments copyrighted, 1913, 1914, by The Banks Law Publishing Company.

Syllabus.

No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly in violation of the Sherman Act.

The Sherman Act is broadly designed to reach all combinations in unlawful restraint of trade and tending, because of the agreements or combinations entered into, to build up and perpetuate monopolies. The act is a limitation of rights which may be pushed to evil consequences and may, therefore, be restrained. *Standard Sanitary Mfg. Co. v. United States*, 228 U. S. 20.

As the agreement involved in this case went beyond any fair and legal means to protect trade and prices, practically prohibited the parties thereto from selling to those it condemned, affected commerce between the States, it was manifestly illegal under the Sherman Act, and was not justified as to copyrighted books under any protection afforded by the copyright act.

Where the State court dismissed the bill solely on the ground that defendant's acts were not within the denunciation of the Federal statute on which plaintiff relied, the judgment will be reversed on [228] that ground and it is unnecessary for this court to decide other Federal questions involved.

Quare, and not now discussed or decided, whether an original action can be maintained in the State courts for injunction and damages under the Sherman Act.

Judgment based on 199 N. Y. 548, reversed.

[58 L. Ed. 192.] *

[ERROR TO STATE COURT—FEDERAL QUESTION—CLAIM UNDER FEDERAL STATUTE.—Plaintiff's contention at the trial in a State court that an agreement between publishers and booksellers to maintain retail prices on copyrighted books not only went beyond the authority conferred in the copyright laws relied upon by defendant, but was in violation of the terms of the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), making illegal combinations in restraint of trade and tending to monopoly, presents a claim of Federal right which is necessarily denied when the highest State court affirms a judgment below in favor of defendant, so as to sustain the appellate jurisdiction of the Federal Supreme Court, under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, governing writs of error to a State court.

[For other cases, see Appeal and Error, 1168-1911, 1436-1445, in Digest Sup. Ct. 1908.]

* The paragraphs following, in brackets, comprise the syllabus of the case as reported in volume 58, page 192, Lawyers Edition, Supreme Court Reports. Syllabus copyrighted 1913, 1914, by The Lawyers Co-operative Publishing Company.

Argument for Plaintiff.

[MONOPOLY—PUBLISHERS AND SELLERS—COPYRIGHTED BOOKS.—The copyright monopoly conferred by the Federal laws does not protect, as against condemnation under the Sherman Anti-Trust Act of July 2, 1890, agreements between associations embracing probably 75 per cent of the book publishers and a majority of the booksellers in the United States, which operate to restrict the sale of copyrighted books to those only who will maintain the fixed net retail price, and result in almost completely destroying competition in such books at retail.]

[For other cases, see Monopoly, II b, in Digest Sup. Ct. 1908.]

The facts, which involve the construction of the Sherman Anti-Trust Act and its application to agreements regarding the sale of copyrighted books, are stated in the opinion.

Mr. Wallace Macfarlane, with whom *Mr. Edmond E. Wise* was on the brief, for plaintiffs in error:

This court has jurisdiction to review the judgment of the State court, because that judgment decided against the plaintiffs in error a Federal right specifically set up and asserted by them in the State courts, which if decided in their favor would have required a contrary judgment.

The State court erred in holding that the agreements, resolutions, or combinations set forth in the complaint which were entered into by the defendants were not unlawful, illegal, and contrary to the statutes of the United States, and more particularly of the statute passed on July 2, 1890, known as "An act to protect trade and commerce against unlawful restraints and monopolies," in so far as concerns copyrighted books.

The agreements obviously restrain trade. They have been entered into by seventy-five per cent of the publishers of the United States and by a large majority of the booksellers of the United States. They affect interstate commerce as well as intrastate trade and operate to restrain trade or commerce among the several States. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Swift & Co. v. United States*, 196 U. S. 375.

The Court of Appeals (177 N. Y. 473) in fact held that, in so far as copyrighted books were concerned, the com-

Argument for Defendants.

[224] bination was in restraint of trade, and it requires little reasoning to show that it contains every element of illegality as to effect, intent, and method of execution condemned by this court in the latest, as well as many of the previous decisions. *American Tobacco Co. v. United States*, 221 U. S. 106; *Standard Oil Co. v. United States*, 221 U. S. 1; *Montague v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *Dr. Miles Medical Co. v. John D. Parks & Sons*, 220 U. S. 373; *United States v. Joint Traffic Asso.*, 171 U. S. 505; *United States v. Freight Asso.*, 166 U. S. 290; *Addyston P. & S. Co. v. United States*, 175 U. S. 211; *Northern Securities Co. v. United States*, 193 U. S. 197.

For cases in which combinations similar to this have been condemned by the courts, see *Cohen v. Berlin & Jones*, 166 N. Y. 392; *Cummings v. Union Bluestone Co.*, 164 N. Y. 401; *People v. Milk Exchange*, 145 N. Y. 267; *Judd v. Harrington*, 139 N. Y. 105; *People v. Sheldon*, 139 N. Y. 251; *Arnot v. Pittston & Elmira Coal Co.*, 68 N. Y. 558; *In re Jacobs*, 98 N. Y. 98; *People v. Gilson*, 109 N. Y. 389; *Brown v. Jacob Pharmacy*, 41 S. E. Rep. 553 (Georgia); *Moore v. Bennett* (Ill., 1892), 15 L. R. A. 361; *People v. Chicago Live Stock Assn.*, 170 Illinois, 556; *Richardson v. Guhl*, 77 Michigan, 632; *State v. Nebraska Distillery Co.*, 29 Nebraska, 200; *Howardson v. Y. & L. Co.*, 111 Wisconsin, 445; *Morris Run Coal Co. v. Bartley Coal Co.*, 61 Pa. St. 173; *Bower v. Trade Council*, 53 N. J. Eq. 301; *Jackson v. Stanfield*, 137 Indiana, 592.

Mr. Stephen H. Olin and *Mr. John G. Milburn* for defendants in error:

This court has no jurisdiction to review the decision of the State courts giving effect to the copyright statute.

The plaintiffs in error did not specially set up or claim [225] any right, privilege, or immunity under the Federal Anti-Trust Act, as to which there was a decision adverse to the right or privilege claimed.

The complaint complained that the agreement therein recited was unlawful under the State laws and the Federal

Argument for Defendants.

statute. The decision was that the agreement was unlawful under the State statute. Hence, the decision was not against the right claimed, although the court did not rest it upon the Federal statute.

Furthermore, the right claimed under the Federal statute was not specially set up or claimed, since in the claim as made was involved a non-Federal claim made under the public policy and statutes of New York. *Pierce v. Somerset Ry.*, 171 U. S. 641; *Allen v. Arguimbau*, 198 U. S. 149; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63; *Klinger v. Missouri*, 13 Wall, 257; *Eustis v. Bolles*, 150 U. S. 361, 366; *Johnson v. Risk*, 137 U. S. 300.

No right under the Federal Anti-Trust Act in relation to copyrighted books was specially set up or claimed by the plaintiffs at any time before the filing of the assignments of error.

As the record shows that no Federal question was at any time specially presented to the appellate courts by the plaintiffs, so the opinions show that no such question as is raised by the assignments of error was in fact considered or decided on either of the appeals. 177 N. Y. 473; 193 N. Y. 496; 194 N. Y. 538; 199 N. Y. 548.

This court has therefore no jurisdiction to examine the alleged errors assigned. *Klinger v. Missouri*, 13 Wall. 257; *De Saussure v. Gaillard*, 127 U. S. 216; *Johnson v. Risk*, 137 U. S. 300; *Bachtel v. Wilson*, 204 U. S. 36, 41; *Ark. So. R. R. v. German Bank*, 207 U. S. 271; *Leathe v. Thomas*, 207 U. S. 93; *Rogers v. Jones*, 214 U. S. 196; *Sauer v. New York*, 206 U. S. 536, 546; *Murdock v. Memphis*, 20 Wall. 590; *Hale v. Akers*, 132 U. S. 554; *Eustis v. Bolles*, 159 U. S. 361; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. [226] 112; *Pierce v. Somerset Railway*, 171 U. S. 641; *Appleby v. Buffalo*, 221 U. S. 524.

No inference of the denial of the Federal question raised in the assignments of error can be based upon the decision itself, because it might have rested upon any of several other grounds, each of which is broad enough to sustain it.

The Sherman Act is not applicable in such an action as this when brought in the State court.

Argument for Defendants.

Agreements creating a monopoly in restraint of trade and against public policy, though invalid and unenforceable, are not illegal in the sense of giving a right of action to third persons for an injury sustained, nor as affording ground for an injunction against threatened injury. *National Fireproofing Co. v. Mason Builders' Assn.*, 169 Fed. Rep. 259; *Penn. R. R. Co. v. Hughes*, 191 U. S. 477; *Locker v. American Tobacco Co.*, 121 App. Div. 443, 449, *affd.* 195 N. Y. 565; *Missouri v. Associated Press*, 51 L. R. A. 170.

No case has been found in which a State court has allowed a recovery based upon the Sherman Act or on account of its violation.

In a suit for an injunction not brought by the Attorney General there can be no recovery on the ground that a combination is illegal under the Federal Anti-Trust Act. *Nat. Fireproofing Co. v. Mason Builders' Assn.*, 169 Fed. Rep. 259, 263; *Pidcock v. Harrington*, 64 Fed. Rep. 821; *Greer, Mills & Co. v. Stoller*, 77 Fed. Rep. 1.

The plaintiffs have not come into a court of equity with clean hands, nor does it appear that the plaintiffs have suffered any actionable damage whatever from the acts complained of.

Notwithstanding the Federal Anti-Trust Act it is lawful for a publisher when selling, at wholesale, books copyrighted by him to fix, by agreement with the purchasing bookseller, the retail price at which such copyrighted books shall be sold during a period of one year. Such is the rule [227] in patent cases. *Bement v. Nat. Harrow Co.*, 186 U. S. 70, 91, 92, 93; *Henry v. Dick Co.*, 224 U. S. 1, 31, 39, 43, 44, 45, 46, 47; *Victor Talking Mach. Co. v. The Fair*, 123 Fed. Rep. 424; *Nat. Phonograph Co. v. Schlegel*, 128 Fed. Rep. 733, 735; Robinson on Patents, § 824; *Edison Phonograph Co. v. Kaufmann*, 105 Fed. Rep. 960; *Park & Sons v. Hartmann*, 153 Fed. Rep. 24; *Edison Phonograph Co. v. Pike*, 116 Fed. Rep. 863.

This rule applies also in copyright cases.

Certain uses of the copyrighted book or article by a purchaser have been held to be lawful; but all other uses are within the absolute and exclusive control of the owner of the copyright. Drone on Copyright, 387-399, 433, 467.

Argument for Defendants.

The same rule should be applied to a copyright as to a patent for a machine. *Story v. Holcombe*, 4 McLean, 306.

The courts have followed the patent cases whenever applicable. *Macgillivray on Copyright*, 281, 282; *Callaghan v. Myers*, 128 U. S. 617; *Reed v. Holliday*, 19 Fed. Rep. 325; *List Pub. Co. v. Keller*, 30 Fed. Rep. 772; *Gilmore v. Anderson*, 38 Fed. Rep. 846; *Harper Bros. v. Donohue*, 144 Fed. Rep. 491, 492; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 64 Fed. Rep. 360; *Harper v. Ranous*, 67 Fed. Rep. 904; *Daly v. Webster*, 56 Fed. Rep. 483, 488; *Ogilvie v. Merriam Co.*, 149 Fed. Rep. 858, 862; *Doan v. Am. Book Co.*, 105 Fed. Rep. 772, 776.

The owner of the copyright may make a valid contract with his publishers as to the selling price of copies of the copyrighted article. *Drone on Copyright*, 365; *Murphy v. Christian Press Assn.*, 38 App. Div. 426, 430; *Parton v. Prang*, 3 Cliff. 537; *Hudson v. Patten*, 1 Root (Conn.), 133; *Aronson v. Baker*, 43 N. J. Eq. 365, 369; *Park v. Natl. Wholesale Druggists' Assn.*, 175 N. Y. 1, 19.

An owner of copyright is not, on the sale of a copyrighted article, necessarily divested of all his statutory [228] rights in regard to it, but only of such rights as he conveys. *Cooper v. Stephens* (1895), 1 Ch. 567; *Marshall & Co., Ltd., v. Bull, Ltd.*, 85 Law Times Rep. 77, 82; *Patterson v. Ogilvie*, 119 Fed. Rep. 453; *Stevens v. Gladding*, 17 How. 447.

The views of defendant in error are sustained in *Dr. Miles Medical Co. v. Park Sons & Co.*, 220 U. S. 373, 404; *Henry v. Dick Co.*, 224 U. S. 1, 43-47.

The agreement involved was not in violation of the Sherman Act.

While it may be that all publishers could not lawfully agree to fix a price upon all copyrighted books, *Murphy v. Christian Press Assn.*, 38 App. Div. 426, or enter into a combination to restrict the output and destroy competition, *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, on the other hand any or all of them might make rules for regulating the conduct of their business among themselves and with the public, and providing for just and fair dealings among them, provided the regulations were made

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for the legitimate purpose of reasonably forwarding personal interest and developing trade, without intent to wrong the general public or limit the right of individuals, or restrain the free flow of commerce, or bring about the evils, such as enhancement of prices, which are considered to be against public policy. *Anderson v. United States*, 171 U. S. 604; *Hopkins v. United States*, 171 U. S., 578; *Standard Oil Co. v. United States*, 221 U. S. 1, 58; *Straus v. American Publishers' Assn.*, 177 N. Y. 473, 477, 488, 489, 490, 491; *Park & Sons Co. v. Nat. Druggists Assn.*, 175 N. Y. 1.

Regulating trade is not restraining trade. There is a well recognized difference. *United States v. Reardon*, 191 Fed. Rep. 454, 458; *Fonotipia, Ltd., v. Bradley*, 171 Fed. Rep. 951, 959; *Heim v. N. Y. Exchange*, 64 Misc. Rep. 529, 531; *Am. Live Stock Com. Co. v. Chicago Live Stock Exchange*, 143 Illinois, 210.

[229] Mr. Justice DAY delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of the State of New York, rendered on remittitur from the Court of Appeals, refusing to grant to the plaintiffs in error an injunction restraining any interference with their purchase and sale of copyrighted books and damages, the defendants acting under an agreement alleged to be violative of the laws of New York and the Sherman Anti-Trust Act (act of July 2, 1890, 26 Stat. 209, c. 647).

The suit originated in a bill filed in the Supreme Court of the State of New York for New York County, in which the plaintiffs in error alleged that they conducted a department store in New York City, a large department of which was devoted to books, magazines, and pamphlets; that, because of their methods of business, they had been able to undersell other retail book stores; that the defendants in error, through the American Publishers' Association and the American Booksellers' Association, and by means of resolutions and agreements, with the coöperation of the associations and their members, and by the use of various practices and methods, to the end that books should be sold to the booksellers only who would maintain the retail price upon

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not copyrighted books for one year and who would not sell books to anyone who would cut such prices, had restrained and prevented competition in the State of New York and throughout all of the United States in the supply and price of books, and that the business of the plaintiffs in error had been seriously affected, and they prayed that the combination and agreements be declared unlawful and that defendants be enjoined from acting thereunder or accomplishing the purposes thereof, and for damages. A demurrer having been interposed to the complaint and sustained by the court at special term and the interlocutory judgment [230] there entered having been reversed upon appeal to the Appellate Division of the First Department, the Court of Appeals, permission having been granted to appeal and the question certified, affirmed the decision and held that, so far as the bill related to copyrighted books, the demurrer was good, but that as to uncopyrighted books the complaint stated facts sufficient to constitute a cause of action. 177 N. Y. 473.

. Amended answers having been filed upon trial to the court without a jury, the court made findings of fact from which it appears that the material allegations of the complaint are true, as above set forth, and further that about April 1, 1904, and after the decision of the Court of Appeals, reported in 177 N. Y., the associations amended their resolutions and agreements so as to restrict the application and operation thereof to copyrighted books only; that about January 19, 1907, the Publishers' Association revoked all its former resolutions and adopted a new resolution, but that the associations had continued the same course as to copyrighted books as was followed before the passage of such resolution. The court concluded that the resolutions and agreements, so far as they related to uncopyrighted books, were unlawful and contrary to the laws of New York, and to that extent granted relief by way of injunction and damages, but held that as to copyrighted books the agreements, resolutions, and acts of the defendants were not unlawful, and entered an interlocutory judgment accordingly; and in its opinion the court stated that the former decision of the Court of Appeals in the case (177 N. Y. 473) was controlling. Plaintiffs in error ex-

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cepted to the conclusions of law made by the court restricting the illegality of the combinations to uncopyrighted books and requested that certain conclusions be made and excepted to the refusal to find the conclusions submitted by them.

From that part of the interlocutory judgment denying [231] relief as to copyrighted books the plaintiffs in error appealed to the Appellate Division, which, also upon the authority of 177 N. Y. 473, affirmed the interlocutory judgment, and judgment of affirmance was entered in the Supreme Court; and, with permission, an appeal was taken to the Court of Appeals, which answered in the negative the question certified by the Appellate Division as to whether plaintiffs in error, in so far as copyrighted books were concerned, were entitled to relief, adhering to its previous decision (177 N. Y. 473). 193 N. Y. 496. Judgment was so entered on remittitur to the Supreme Court. The report of the referee appointed to ascertain the amount of the damages sustained by the plaintiffs in error in the sale of uncopyrighted books having been filed and approved, final judgment was entered in the Supreme Court granting an injunction and damages as to uncopyrighted books only, and upon appeal to the Court of Appeals that court affirmed the final judgment (199 N. Y. 548) and remitted the case to the Supreme Court. Judgment on remittitur was accordingly entered, and this writ of error sued out to review that judgment.

In this court a motion was made to dismiss the writ of error upon the ground that it presents no Federal question so saved and brought here as to permit a review of such question. When the case was before the Court of Appeals upon demurrer to the complaint (177 N. Y. 473) that court held that the agreement, as to copyrighted books, was not illegal, because of the monopoly granted to the holder of a copyright under the statutes of the United States. The court held that the agreement as to uncopyrighted books was, however, in violation of the so-called antitrust law of New York, chapter 690, Laws of 1899, making contracts, agreements, etc., creating monopoly or restraining or preventing competition in the supply or price of articles or

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commodities void as against public policy. Subsequently the agreement was modified so as [232] to apply to copyrighted books only and findings of fact were specifically made upon which the case again went to the Court of Appeals of New York upon the certified question: "Are the plaintiffs, under the findings of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?" Upon the record the Court of Appeals by a majority adhered to its former decision, notwithstanding the decision of *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, which had in the meantime been decided by this court, and held that, as the object of the copyright and patent statutes was to give monopolies, contracts made by the owners of copyrights to secure the fullest protection in the enjoyment of their monopolies would not be condemned by the courts as being in unlawful restraint of trade, at least not until the Supreme Court of the United States had pronounced differently (193 N. Y. 496). Three of the justices dissented upon the ground that the agreement was clearly one in restraint of trade, as they had theretofore held, and that the decision of this court in *Bobbs-Merrill Co. v. Straus*, *supra*, had so construed the copyright act as to limit the right of a copyright holder to the sale of copyrighted works and did not have the effect to protect such monopolistic agreements as were shown in the present case. As to uncopyrighted books the views theretofore expressed were maintained by the court and upon remittitur judgment was entered granting injunction and damages as to such books.

An inspection of the record shows that before the case went before the Court of Appeals for decision the second time upon the facts found in the lower court the following conclusions of law were specifically requested covering the effect of the Sherman Anti-Trust Act as to copyrighted books dealt with in interstate commerce, as was found to be established by the facts in the present case:

[233] "VII. That such resolutions and agreements purporting to restrict the effect of the combination, arrangement, or contracts to

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copyrighted books likewise affect an article of interstate commerce and was unlawful and contrary to the aforementioned statute [the Sherman Anti-Trust Act] of the United States as being in restraint to interstate commerce and tending to create a monopoly.

"IX. That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the statutes of the United States against combinations in restraint of trade or for the purpose of creating a monopoly, if entered into with reference to the supply or price of uncopyrighted books."

It is thus apparent that, when the defendants below set up the copyright statute of the United States as an authority for the agreement of the character here in question, the plaintiffs contended that such agreement was not only beyond the authority conferred in the copyright act but was in violation of the terms of the Sherman Anti-Trust Law, making illegal combinations in restraint of trade and tending to monopoly. This contention was in terms denied by the lower court and the decision upon the facts went to the Court of Appeals, with the result which we have stated. The contention thus made as to the effect of the Sherman Anti-Trust Act when read in connection with the copyright act of the United States presented a question of a Federal character to the State courts, which claim of Federal right was necessarily denied in the decision of the Court of Appeals, affirming the judgment of the court below. One who sets up a Federal statute as giving immunity from a judgment against him, which claim is denied by the decision of a State court, may bring the case here for review under § 709 of the Revised Statutes, now § 237 of the Judicial Code. *Nutt v. Knut*, 200 U. S. 12; *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U. S. 281; *St. Louis & Iron Mountain Ry. v. McWhirter*, 229 U. S. 265. The motion to dismiss for want of jurisdiction must therefore be overruled.

This court in the case of *Bobbs-Merrill Co. v. Straus*, *supra*, held that the copyright act did not grant the right to fix a limitation upon prices of books at subsequent sales to purchasers from retailers by notice of price limitation

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inscribed upon the book, and, construing the copyright act, held that in conferring the right to vend a book it did not intend to confer upon the holder of the copyright any further right after he had exercised the right to vend secured to him by the act.

In the case of *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, this court had under consideration the effect of the patent statute upon agreements found to be unlawful under the Sherman law, and the agreements condemned were held not to be protected as within the patent monopoly conferred by the statute. Replying to the contention as to the protection which the patent law gave to enter into such agreements, this court said (p. 49):

"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights—rights which may be pushed to evil consequences and therefore restrained."

So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly de[235]signed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies.

From the finding of facts upon which the court certified the question decided to the Court of Appeals, after the attempted reformation in view of the first decision of that court it appears that the Publishers' Association was composed of probably seventy-five per cent of the publishers of copyrighted and uncopyrighted books in the United States and that the Booksellers' Association included a majority of the booksellers throughout the United States; that the associations adopted resolutions and made agreements obligating their members to sell copyrighted books only to those who would maintain the retail price of such

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net copyrighted books, and, to that end, that the Associations combined and coöperated with the effect that competition in such books at retail was almost completely destroyed. The findings further show that the associations employed various methods of ascertaining whether prices of net copyrighted books were cut and whether there was competition in the sale thereof at retail, and issued cut-off lists, so-called, directing the discontinuance of the sale of such books to offenders, and that the plaintiffs in error, who had failed to maintain net prices upon copyrighted books, had been put upon the cut-off lists and were unable to secure a supply of such books in the ordinary course of business. It further appears that in some instances dealers who had supplied the plaintiffs in error were wholly ruined and driven out of business; that the Booksellers' Association widely circulated the names of such dealers and warned others to avoid their fate, and that various circulars were issued to the trade at large by both associations warning all persons against dealing with the plaintiffs in error or other so-called price cutters; that after the reformation of the resolutions and agreements in 1904 the associations and [236] their members continued the same methods as to ascertaining the supply of copyrighted books of the plaintiffs in error, as to cut-off lists and circulars to the trade, and that, although in 1907 the resolution of the Publishers' Association was modified so that the "agreement" became a "recommendation," the cut-off lists were still issued, with plaintiff's name thereon and that the dealers still refused to supply plaintiffs in error with books of any kind. And it also appears from the finding of facts that the members of the associations resided in and carried on the business of selling books in many different States and purchased books from persons in many States other than the one in which they resided and did business; and that the rules, regulations, and agreements of the associations were enforced against all publishers and dealers in books throughout the United States, whether they were members of either association or not and whether they purchased books in one State for transportation and delivery in another or for delivery in the State where purchased.

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We agree with the Court of Appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the copyright act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among the parties thereto and prevented, as the Court of Appeals said, when dealing with uncopyrighted books, the sale of books of any kind, at any price, to those who were condemned by the terms of the agreement and with whom dealings were practically prohibited. We conclude, therefore, that the Court of Appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman Act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the State act as to copyrighted books.

[237] This view of the case renders it unnecessary to decide whether an original action can be maintained in the State courts seeking an injunction and to recover damages under the Sherman Law.

As the Federal question, made in the manner which we have stated, was in our view wrongly decided and such decision was the basis of the judgment in the State court, the judgment of that court must be reversed. *Murdock v. City of Memphis*, 20 Wall. 590, 634.

Judgment reversed and case remanded to the State court whence it came for further proceedings not inconsistent with this opinion.

UNITED STATES *v.* EASTERN STATES RETAIL
LUMBER DEALERS' ASS'N ET AL.*

(District Court, S. D. New York. January 9, 1912.)

[201 Fed. Rep., 581.]

MONOPOLIES (§ 12)—SHERMAN ANTI-TRUST ACT—COMBINATIONS IN RESTRAINT OF TRADE—LUMBER DEALERS' ASSOCIATIONS.—Associations of retail lumber dealers, which issue and distribute among their members "official reports," containing lists of wholesale deal-

* For opinion of the Supreme Court (234 U. S., 600), see *post*, page 868.

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ers doing an interstate business, who have made sales direct to consumers, and soliciting information as to other such sales, for the purpose and with the effect of influencing members receiving them to cease buying from such wholesale dealers, are combinations in restraint of interstate trade and commerce, and unlawful, under Sherman Anti-Trust Act, July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

MONOPOLIES (§ 12)—**SHERMAN ANTI-TRUST ACT**—"RESTRAINT OF TRADE"—The words "restraint of trade," as used in Sherman Anti-Trust Act, July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), are to be construed as including "restraint of competition."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

In Equity. Suit by the United States against the Eastern States Retail Lumber Dealers' Association and others. Decree for complainant.

This is an action under the Anti-Trust Act, brought by the United States against various associations and corporations composed of retail lumber dealers, who are charged with being parties to a general conspiracy and combination, which it is alleged has limited competition and unlawfully obstructed the free flow of trade and commerce among the States in lumber and lumber products.

Clark McKercher, Special Asst. Atty. Gen., of Washington, D. C., for the United States.

Alfred B. Cruikshank, of New York City, for Eastern States Retail Lumber Co. and others.

Morgan, Lewis & Bockius, of Philadelphia, Pa. (*Howard Taylor*, of St. Louis, Mo., of counsel), for Philadelphia Retail Lumber Dealers.

Before **LACOMBE**, **COXE**, **WARD**, and **NOYES**, Circuit Judges.

* Syllabus copyrighted, 1913, by West Publishing Company.

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LACOMBE, Circuit Judge.

[1] Although the record is a long one, the concrete questions here presented lie within a narrow compass. Certain resolutions, which at one time or another were adopted at conferences between the defendants represented by delegates, [582] were abrogated some time before the suit was brought. Various lists were circulated in the trade, at one time or another, known in the record as the "Yes List," the "No List," "List No. 1," "List No. 2," and "List C"; but the circulation of such lists stopped before suit was brought, and there is nothing in the record to indicate that there is any intention to resume their circulation by defendants or by anyone else. The extensive testimony as to these earlier resolutions and lists was properly introduced as illuminative of the intent with which the continuing circulation of other lists is carried on and of the object sought to be obtained thereby.

The lists which are still being circulated may be called, for lack of a better name, "Official Reports." Nothing else, so far as we understand it, is now or was being done at the time suit was brought by defendants as a combination, except the circulation of these lists, among the members of retail lumber dealers' associations and corporations. This seems to be the extent of their offending. Each of these Official Reports reads as follows:

"Official Report.

"[Name of the Particular Association Circulating It.]

"Statement to Members [with the Date].

"You are reminded that it is because you are members of our association, and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you, and that they communicate it to you in strictest confidence and with the understanding that you are to receive and treat it in the same way.

"The following are reported as having solicited, quoted, or as having sold direct to the consumers: [Here follows a list of the names and addresses of various wholesale dealers.]

"Members, upon learning of any instance of persons soliciting, quoting, or selling direct to consumers should at once report same, and in so doing should, if possible, supply the following information:

"The number and initials of car.

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- "The name of consumer to whom the car is consigned.
- "The initials or name of shipper.
- "The date of arrival of car.
- "The place of delivery.
- "The point of origin."

A brief statement of the conditions of the lumber business will make plain the bearing of this circular. The trade for a long time has been naturally divided into separate groups:

1. The manufacturer or millman usually turns the standing timber or the felled trees into one or more kinds of rough lumber. He sells either directly to the retail yard dealer, or to the wholesale dealer, or to large consumers using large quantities of one kind of lumber.

2. The wholesale dealers are usually located at or near the large markets, such as New York, Chicago, etc. In some cases the wholesale dealer maintains a yard; but usually he does not do so, acting as middleman to transmit orders from his customer to the millman, who fills the order direct to the customer. A very large part of the wholesaler's business is the selling of large lots (car load or schooner load shipments) to the retail dealer. There are some wholesalers who make it a rule to sell and ship only to retail yards; others sell only to large [583] consumers; others sell to both classes. The brief for the Government contains this statement, which seems to be supported by the record:

"It has been the custom for nearly all manufacturers, millmen, and wholesalers of good standing to protect the retail yard dealer in any city by refusing to sell to a consumer who is a customer of the retail yard dealer to whom such manufacturer or wholesaler sold lumber. But there is and always has been a large class of reputable manufacturers and wholesale dealers who sell lumber to large consumers in any city where such manufacturers and wholesalers have no customers among retail yard dealers, or where the large consumer is not a customer of any yard at retail prices."

3. The retail dealers are located in nearly every town and city in the New England and Middle States. They have yards in which they store lumber bought from the wholesaler or the millman. From his yard the retailer supplies the local demand for building or manufacturing purposes.

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In some places the retailer also delivers lumber to the consumer directly from schooners or cars, without first placing in his yard, where the order is for a large quantity.

4. The consumers are divided into several groups: (a) The contracting builder of houses, bridges, wharves, and who also does repair and construction work of all kinds. (b) The converter or manufacturer, who converts the sawed lumber into furniture and "trim," such as moldings, frames, sash, doors, and blinds, and in some cases into boxes and containers. (c) The United States Government, and, in some localities, municipalities and railroads. (d) The small consumer of lumber for small building, repair, and construction work. (e) Large factories and manufacturing establishments using lumber in large quantities for special purposes.

The retail dealer has to carry many different kinds of lumber in stock in his yard to make prompt delivery of what may be called for. The natural customer of the retailer is the local contracting builder, who requires either a large number of items in small lots or particular items for immediate delivery. He also secures some of the trade of other consumers, such as large contracting builders of railroads, docks, etc., and factories of all sorts.

For a number of years there has been friction between the two groups, wholesalers and retailers. Wholesalers have complained because some retail dealer has not been content with selling in small lots for local delivery, but has negotiated sales of large lots from millmen to consumer. Retailers have complained because some wholesalers, having discovered a retail dealer's local customers, have themselves sold to such local customers in competition with the retailer. We need not go into the details of this controversy, which are spread out at great length in the record. Suffice it to say that the "official report" is a method adopted by the retailers to check this competition. Retail dealers, who are members of one or other of these associations defendant, are not required by their associations to refrain from dealing with any wholesaler whose names are on the list. There is no fine or penalty for dealing with

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them; nor is the retailer disciplined in any way if he does deal with them. But the record indicates that no such discipline is necessary. A retail dealer who learns that some wholesaler has taken away customers from another retail dealer will not be likely to buy from him, lest, learning the names of his own [584] customers, the wholesaler might compete with himself to get their trade. In the brief filed for one of the defendants there is a frank and concise summary of the situation:

"Ordinarily speaking, and other things being equal, a retailer would not buy his own source of supply from people on these lists, and wholesalers would object strongly to getting on these lists, because, if they were found out at the business of selling retailers' customers, they knew a retailer would be shy of buying from them."

To a greater or less extent, therefore, the circulation of these "official reports" operates to prevent some wholesalers, who otherwise would enter into competition with retailers in supplying consumers, from undertaking so to compete. That the reports are prepared and circulated to accomplish that very object is manifest.

No doubt every retail dealer has a right to choose from whom he will buy. He has a right to impart to anyone else any information he may have about the business methods of anyone, even though the natural result of thus telling what he knows may induce the person whom he tells to cease business relations with the other person. May the several retail dealers combine into an association, in order the better to acquire and distribute knowledge about the business methods of others, by means of the circulation among themselves of reports such as these?

[2] It seems to us that they can not do so without violating the Sherman Act. It is now well settled that the words "restraint of trade" in that act are to be construed as including "restraint of competition." Full, free, and untrammelled competition in all branches of interstate commerce is the desideratum to be secured.

Much is said in argument of the evils which will result if the retail dealers are prevented from taking defensive measures to restrain the competition with them of the whole-

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saler, who, having no yard, and not seeking the smaller local trade of the retailer, is endeavoring to take away the profitable part of his trade. It is pointed out that it is expensive for a retailer to maintain a yard, with large quantities of a great variety of lumber in it, ready for prompt delivery at all times. If his business shrinks, through his losing the chance of making car and schooner load sales in his locality, the local yard, it is said, will become less and less well stocked, and will finally disappear entirely. But with such ultimate results the court is not concerned. Congress has considered the results, and chosen what seemed to it the wisest course.

"Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition * * * may be productive of evils does not militate against the fact that such is the law now governing the subject." *U. S. v. Freight Association*, 166 U. S. 337, 17 Sup. Ct. 557, 41 L. Ed. 1007.

The circulation of this circular certainly tends to restrain directly some wholesalers from entering into competition with retailers. This [585] seems to be contrary to the statute as the Supreme Court has construed it. That the defendants and their members are in a combination to prepare such circulars and to distribute them is manifest.

We conclude that the Government is entitled to an injunction against the further circulation of these "official reports."

Syllabus.

EASTERN STATES RETAIL LUMBER DEALERS'
ASSOCIATION v. UNITED STATES.*

McBRIDE, INDIVIDUALLY AND AS PRESIDENT
OF THE RETAIL LUMBERMEN'S ASSOCIATION
OF PHILADELPHIA, v. THE UNITED STATES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 511, 550. Argued October 24, 27, 1913.—Decided June 22, 1914.

[234 U. S., 600.]

Conspiracies are seldom capable of proof by direct testimony and a conspiracy to accomplish that which is their natural consequence may be inferred from the things actually done.^b

The Sherman Law, as construed by this court in the *Standard Oil Case*, while not reaching normal and usual contracts incident to lawful purposes and in furtherance of legitimate trade, does broadly condemn all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce.

Held in this case that the circulation of a so-called official report among members of an association of retail dealers calling attention to actions [601] of listed wholesale dealers in selling direct to consumers, tended to prevent members of the association from dealing with the listed dealers referred to in the report, and to directly and unreasonably restrain trade by preventing it with such listed dealers, and was within the prohibitions of the Sherman Law.

While a retail dealer may unquestionably stop dealing with a wholesaler for any reason sufficient to himself, he and other dealers may not combine and agree that none of them will deal with such wholesaler without, in case interstate commerce is involved, violating the Sherman Law.

An act, harmless when done by one person, may become a public wrong when done by many acting in concert in pursuance of a conspiracy. *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433.

201 Fed. Rep. 581.

* For opinion of the district court (201 Fed. 581), see *ante*, page 856.

^b Syllabus and statements of arguments copyrighted, 1914, by The Banks Law Publishing Company.

Argument for Appellants.

[58 L. Ed. 1490.*]

[**MONOPOLY—COMBINATION OF RETAILERS—SUPPRESSING COMPETITION BY WHOLESALERS.**—The concerted, systematic, and periodic circulation by associations of retail lumber dealers among their members through a so-called "official report" of confidential information of the names of wholesale lumber dealers engaged in interstate trade reported as soliciting from, or selling directly to, consumers, such members, upon learning of any such instances, being called upon to report the same promptly, supplying detailed information as to the particulars of the transaction, violates the prohibitions of the Anti-Trust Act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), against combinations in restraint of interstate trade and commerce, where, although each retailer is left free to act as he sees fit, these reports were circulated with the intention and effect of causing the retailers to withhold their patronage from the listed wholesalers, and thus directly and appreciably impairing their interstate trade.)

[For other cases, see Monopolies, II b, in Digest Sup. Ct. 1908.]

The facts, which involve the determination of whether an arrangement between certain retail lumbermen's associations in regard to their relations with wholesale dealers amounted to a combination and conspiracy in restraint of trade within the prohibitions of the Sherman Act, are stated in the opinion.

Mr. Alfred B. Cruikshank for appellants in No. 511, and *Mr. Howard Taylor*, with whom *Mr. Charles E. Morgan*, *Mr. C. E. Morgan, 3d*, and *Mr. Charles B. Brophy* were on the brief, for appellants in No. 550:

The Sherman Act prohibits undue limitations on competitive conditions.

The combination, or concerted action, of these defendants in distributing circulars stating the true position of lumbermen in the trade was not a combination which unduly restrained competition.

The true question under the English and American authorities is whether the circulation of the "Official Lists"

* The paragraph following, in brackets, comprises the syllabus of the case as reported in volume 58, page 1490, Lawyers Edition, Supreme Court Reports. Syllabus copyrighted 1913, 1914, by The Lawyers Co-operative Publishing Company.

Argument for Appellants.

is a reasonable defensive measure or is an unreasonable, offensive, and malicious means to eliminate competition.

There was no combination or concert of action among defendants to boycott those whose names appeared on the "Official Reports."

[602] The evidence concerning past occurrences, if relevant at all, tends to establish that the defendants' present intent is right and law abiding.

These present appellants are not responsible for the actions of individuals in other local associations.

There was no confederation among the various local associations, except with respect to the circulation of the "Official Reports."

No absurdities were contemplated by the Sherman Act.

In support of these contentions, see *Aikens v. Wisconsin*, 195 U. S. 194; *Allan v. Flood*, App. Cas. 1898, 1; *Bohn Mfg. Co. v. Hollis*, 54 Minnesota, 223; *Carew v. Rutherford*, 106 Massachusetts, 1, 14; *Central Lumber Co. v. South Dakota*, 226 U. S. 157; *Collins v. American News Co.*, 34 Misc. 260; *S. C.*, aff'd, 68 App. Div. 639; *Continental Ins. Co. v. Underwriters*, 67 Fed. Rep. 310, 320; *Cooke on Combinations* (2d ed.), c. V; *Cooley on Torts* (2d ed.), 328; *Dueber Watch Co. v. Howard*, 55 Fed. Rep. 851, 854; *S. C.*, 66 Fed. Rep. 637, 645; *Ertz v. Produce Exchange*, 79 Minnesota, 140, 144; *Gompers v. Bucks Stove Co.*, 221 U. S. 418, 436; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 441; *Lawlor v. Loewe*, 187 Fed. Rep. 522, 526; *Loewe v. Lawlor*, 208 U. S. 274, 291; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 259; *Mills v. United States Printing Co.*, 99 App. Div. (N. Y.) 605; *Mogul Steamship Co.*, App. Cas. 1892, 25; *S. C.*, L. R. 23, Q. B. 598, 614; *Montgomery Ward Co. v. South Dakota Retail Ass'n*, 150 Fed. Rep. 413; *Nash v. United States*, 229 U. S. 373; *National Protective Ass'n v. Cuming*, 170 N. Y. 315; *Quinn v. Lathem*, App. Cas. 1901, 495, 512; *Standard Oil Co. v. United States*, 221 U. S. 1, 58; *State v. Adams Lumber Co.*, 81 Nebraska, 392, 412; *Toledo & C. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, 738; *United States v. Trans-Missouri Association*, 166 U. S. 290, 337; *United States v. Kissel*, 218 U. S. 601; *United States v.*

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Amer. Tobacco Co., 221 U. S. 106, 177; *United States v. St. Louis Terminal*, 224 U. S. 383, [603] 394; *United States v. Reading Co.*, 226 U. S. 324; *United States v. Un. Pac. R. R. Co.*, 228 U. S. 61, 84; *Wabash R. R. Co. v. Hannahan*, 121 Fed. Rep. 563, 569; *Walker v. Cronin*, 107 Massachusetts, 555, 564.

Mr. Assistant to the Attorney General Todd for the United States:

The evidence establishes an agreement or combination between the defendant retailers to prevent wholesalers from selling directly to consumers by refusing to buy from (boycotting) them if they do. This is shown by the declared purpose of the defendant associations as disclosed by their constitutions and by-laws; the compilation and circulation of the so-called "officials reports" or blacklists; the actual course of conduct of defendants in concertedly withdrawing their patronage from listed wholesalers; admissions of members of defendant associations; and other testimony showing general recognition of and obedience to a tacit or moral obligation upon members so to withdraw their patronage. The inference of an agreement to boycott is confirmed by the decisions of other courts in conspiracy cases. *Commonwealth v. McLean*, 2 Pars. (Pa.) 367; 3 Greenleaf on Ev., § 93; *Patnode v. Westenhaver*, 114 Wisconsin, 460; *Regina v. Murphy*, 8 C. & P. 397; *Reilly v. United States*, 106 Fed. Rep. 896; *State v. Adams Lumber Co.*, 81 Nebraska, 392; *United States v. Sacia*, 2 Fed. Rep. 754; *Webb v. Drake*, 26 So. Rep. (La.) 791; 2 Wharton, Criminal Law, § 1398.

An agreement or combination by retailers to refuse to buy from (boycott) wholesalers who sell directly to consumers interferes with the free and normal flow of trade and therefore violates the Anti-Trust Act. *Bailey v. Master Plumbers' Ass'n*, 103 Tennessee, 99; *Beck v. Railway Teamsters' Union*, 42 L. R. A. 407; *Bohn Mfg. Co. v. Hollis*, 54 Minnesota, 223; *Boutwell v. Marr*, 71 Vermont, 1; *Brown v. Jacobs Phar. Co.*, 115 Georgia, 429; *Casey v. [604] Cincinnati Typographical Union*, 45 Fed. Rep. 135; *Doremus v. Hennessy*, 176 Illinois, 608; *Ellis v. Inman*, 131 Fed. Rep. 183;

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Gompers v. Bucks Stove Co., 221 U. S. 418; *Same v. Same*, 33 App. D. C. 83; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433; *Hawarden v. Youghiogheny Coal Co.*, 111 Wisconsin, 545; *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912; *Jackson v. Stanfield*, 137 Indiana, 592; *Klingel's Pharmacy v. Sharp*, 104 Maryland, 218; *Loewe v. Lawlor*, 208 U. S. 274; *Lucke v. Clothing Cutters Ass'n*, 77 Maryland, 396; *Macaulay Bros. v. Tierney*, 19 R. I. 255; *Montgomery Ward & Co. v. So. Dak. Merchants' Ass'n*, 150 Fed. Rep. 413; *Montague v. Lowry*, 193 U. S. 88; *Olive v. Van Patten*, 7 Tex. Civ. App. 680; *Purington v. Hinckliff*, 219 Illinois, 159; *Retail Dealers' Ass'n v. State*, 48 So. Rep. (Miss.) 1021; *State v. Adams Lumber Co.*, 81 Nebraska, 393; *Steers v. United States*, 192 Fed. Rep. 1; *Thomas v. C., N. O. & T. P. R. Co.*, 62 Fed. Rep. 803; *Webb v. Drake*, 26 So. Rep. (La.) 791.

Viewing the agreement or combination between the defendants merely as one to circulate amongst themselves lists of wholesalers who sell directly to consumers, it unreasonably restricts competition between wholesalers and retailers in selling to consumers and therefore violates the Anti-Trust Act. *Am. Tobacco Co. v. United States*, 221 U. S. 106; *Nash v. United States*, 229 U. S. 373; *Quinn v. Leatham* (1901), A. C. 495; *Standard Oil Co. Case*, 221 U. S. 1.

The plea that this combination was a reasonable and necessary measure to defend the position of retailers in the trade is irrelevant in law and unfounded in fact. *Ches. & Ohio Fuel Co. v. United States*, 115 Fed. Rep. 610; *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433; *Loewe v. Lawlor*, 187 Fed. Rep. 522.

Mr. Justice DAY delivered the opinion of the court.

These are appeals from a decree of the District Court of the United States for the Southern District of New York [605] in an action brought by the United States under the Sherman Anti-Trust Act (July 2, 1890, c. 647, 26 Stat. 209), having for its object an injunction against certain alleged combinations of retail lumber dealers, which, it was averred, had entered into a conspiracy to prevent wholesale

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dealers from selling directly to consumers of lumber. The defendants are various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland, and the District of Columbia, and the officers and directors of the associations. The record is very voluminous, but the facts essential to a consideration of the decree of the district court are in comparatively narrow compass. While the record also concerns practices which are said to have been abandoned, the decree entered, declaring the defendants named to be in a combination or conspiracy to restrict and restrain competition, depends solely upon the method adopted and being used by the defendants in the distribution of the information contained in a certain document known as the "Official Report," the form of which, set forth in the decree, is as follows:

"OFFICIAL REPORT.

"(Name of the Particular Association Circulating it.)

"STATEMENT TO MEMBERS (WITH THE DATE).

"You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate it to you in strictest confidence and with the understanding that you are to receive it and treat it in the same way.

"The following are reported as having solicited, quoted or as having sold direct to the consumers:

"(Here follows a list of the names and addresses of various wholesale dealers.)

[606] "Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

"The number and initials of car.

"The name of consumer to whom the car is consigned.

"The initials or name of shipper.

"The date of arrival of car.

"The place of delivery.

"The point of origin";

and the defendants were enjoined from combining, conspiring or agreeing together to distribute and from distributing to members of the associations named or any other person or persons any information showing soliciting, quota-

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tions, or sales and shipments of lumber and lumber products from manufacturers and wholesalers to consumers of or dealers in lumber, and from the preparation and distribution of the lists above described as the "Official Report" or the use of a similar device.

The record discloses that the defendant associations are constituted largely of retail lumber dealers, each of whom has the natural desire to control his local trade, which the retailers contend has been unduly interfered with by the wholesalers in selling to consumers within the local territory in such wise as to conflict with what they regard as a strictly local trade, and it appears that the defendant associations have for their object, among other things, the adoption of ways and means to protect such trade and to prevent the wholesale dealers from intruding therein. The particular thing which this case concerns in the retailers' efforts to promote the end in view is the attempt in the manner shown, by the circulation of the reports in question, to keep the wholesalers from selling directly to the local trade. The trade of the wholesalers involved covers a number of States, and there is no question but that the supplying of lumber to the large num[607]bers of retailers in these associations in different States is interstate trade and that if the practices are illegal within the Sherman Act they may be reached by this proceeding. *Swift & Co. v. United States*, 196 U. S. 375; *Loewe v. Lawlor*, 208 U. S. 274, 300.

The record discloses a systematic circulation among the members of the defendant associations of the official report above quoted. The method of operation as stated by the learned counsel for the appellants is thus summarized in his brief:

"The names on this list are obtained and placed thereon as the result of complaints made by individual retailers. When an individual member of a retail association learns of a sale by a wholesaler to one of the customers of the retailer he may complain in writing to the secretary of his association, whose duty it is thereupon to ascertain the facts by correspondence with the wholesaler in question and such other means as may seem proper. Should the report or complaint be without proper foundation or should the secretary become satisfied that the matter is a trifling one or the result of inadvertence, the incident usually terminates at this point;

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but should the complaint appear to be serious and well founded the case is submitted to the board of directors of the retail association at its next meeting and should the board be satisfied that the wholesaler is generally making a practice of selling to consumers or customers of the retail trade, the secretary is directed to report the name of such wholesaler for the official list. Thereupon the secretary sends the name to Mr. Crary, of New York, who adds it upon the next report to the names of those already thereupon. Each report contains the names of all wholesalers who have been reported from the very beginning as selling to consumers and whose names have not been removed for cause. The reports or lists after being printed in New York are distributed amongst the secretaries of the defendant associa[608]tions; those for each association being marked with its name and in that way only being distinguished from those sent to the other associations. The secretary of each association then distributes the lists to his members. Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers. In practice the greatest care is taken to make the list accurate, and as a matter of fact, it only contains the names of such wholesalers as are absolutely committed to the practice of competing with retailers for the custom of builders and contractors."

The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to consumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade there can be but one purpose in giving the information in this form to the members of the retail associations of the names of all wholesalers who by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing

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with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the [609] purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. Indeed this purpose is practically conceded in the brief of the learned counsel for the appellants:

"It was and is conceded by defendants and the court below found that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was of course the very object of the defendants in circulating them."

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed.

The Sherman Act has been so frequently and recently before this court as to require no extended discussion now. *Standard Oil Co. v. United States*, 221 U. S. 1; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. St. Louis Terminal*, 224 U. S. 383; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *United States v. Union Pacific R. R. Co.*, 226 U. S. 61; *United States v. Reading Co.*, 226 U. S. 324; *United States v. Patten*, 226 U. S. 525; *Nash v. United States*, 229 U. S. 378; *Straus v. American Publishers' Ass'n*, 231 U. S. 22. It broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. It is true that this court held in the *Standard Oil* and *Tobacco* cases, *supra*, and in the subsequent cases following them, that in its proper construction the act was not intended to reach normal and usual contracts incident to lawful purposes and intended to [610] further legitimate trade, and summarizing the meaning of the act in the *Tobacco* case, this court said (221 U. S. 179):

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* case that as the words 'restraint of

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trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

The same principle was affirmed in *Nash v. United States*, *supra*. The court in the Standard Oil case construed the act as intended to reach only combinations unduly restrictive of the flow of commerce or unduly restrictive of competition, and, illustrating what were such undue or unreasonable combinations, it classed as illegal (p. 58) "all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." And in *Loewe v. Lawlor*, *supra*, this court held that a combination to boycott the hats of a manufacturer and deter dealers from buying them in order to coerce the manufacturer to a particular course of action with reference to labor organizations, the effect of the combination being to compel third parties and strangers not to engage in a course of trade except upon conditions which the combination imposed, was within the Sherman Act. In *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, after citing *Loewe v. Lawlor*, *supra*, this court said (p. 438):

"But the principle announced by the court was general. It [the Sherman Act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrange-

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ments, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter."

And see *Montague & Co. v. Lowry*, 193 U. S. 38.

These principles are applicable to this situation. Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him but with all others of the class who may be informed of his delinquency. "Section 1 of the act, * * * is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial [612] conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein." *United States v. Patten*, *supra*, p. 541. This record abounds in instances where the offending dealer was thus reported, the hoped-for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired.

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed

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dealers from entering into competition with retailers, as was held by the District Court, but it directly tends to prevent other retailers who have no personal grievance against him and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance when brought to the attention of others it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe v. Lawlor*, *supra*.

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe Co. v. United States*, 175 U. S. 211, 241, 242.

Anderson v. United States, 171 U. S. 604, is cited and relied upon by the appellants. In that case this court sustained, as against an attack under the Sherman Law, the legality of an association called the Traders' Live Stock Exchange in Kansas City. An agreement among purchasers of cattle for the purpose of regulating and controlling the local business among themselves had been entered into, and one of the rules provided that the members of the exchange should not deal with any other yard trader unless he was a member of such exchange. It was said (p. 613):

"There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading, or selling their stock, or that they have in any

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way interfered with the freedom of access to the stockyards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stockyards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to."

[614] As distinguished from this situation the present case shows that the trade of the listed wholesalers is hindered or impeded; that competition is suppressed and the natural flow of commerce interfered with as the direct result of the circulation of the official reports in the manner stated. The case is quite different from the Anderson case. And see *Montague & Co. v. Lowry*, *supra*, p. 48.

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. "But," as was said by Mr. Justice Lurton, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440, "when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding. It follows that its decree must be Affirmed.

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CITIZENS' WHOLESALE SUPPLY CO. v. SNYDER
ET AL.

(Circuit Court of Appeals, Third Circuit. February 1, 1913.)

[201 Fed. Rep. 907.]

MONOPOLIES (§ 12)—COMBINATIONS—VIOLATION OF FEDERAL ANTI-TRUST LAW.—Citizens of a municipality, who in good faith combine to enforce an ordinance thereof, believing on reasonable grounds that it is valid, while in fact invalid as interfering with interstate commerce and so finally adjudged in the litigation instituted by them, are not guilty of violating Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and are not liable for damages sustained by the person prosecuted by them for violating the ordinance.*

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.]

[908] In Error to the District Court of the United States for the Middle District of Pennsylvania; Joseph Buffington, Judge.

Action by the Citizens' Wholesale Supply Company against Dennis H. Snyder and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

A. A. Vosburg, of Scranton, Pa., *Philemon S. Karshner*, of Adelphi, Ohio, and *John C. Nissley*, of Harrisburg, Pa., for plaintiff in error.

Harry S. Knight, of Sunbury, Pa., and *M. H. Taggart*, of Northumberland, Pa., for defendants in error.

Before GRAY and McPHERSON, Circuit Judges, and RELLSTAB, District Judge.

J. B. McPHERSON, Circuit Judge.

In this action the Supply Company, an Ohio corporation, charges certain citizens of Sunbury, Pa., with violating the Anti-Trust Act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The statement of claim avers that the defendants, an unincorporated association of merchants and business men, combined to restrain

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the interstate trade of the Supply Company in groceries and other merchandise. The trial judge non-suited the plaintiff, and adhered to that ruling upon the subsequent motion required by the State practice. The facts are as follows:

Since the early years of the State the subject of "peddling"—selling at retail from house to house or on the streets of a municipality—has been much considered in Pennsylvania, both by the legislature and by the councils of cities and boroughs. And the courts have often been called upon to determine the scope and validity of numerous ordinances dealing with this persistently agitated matter. Among recent decisions of the appellate courts is the case of *North Wales Borough v. Brownback*, 10 Pa. Super. Ct. 227, in which an ordinance drawn in a particular form was held to be valid by the Superior Court; this ruling being afterwards affirmed by the Supreme Court, 194 Pa. 609, 45 Atl. 660, 49 L. R. A. 446. The decision of the Superior Court was announced in April, 1899, and in the following December the borough of Sunbury passed an ordinance essentially the same as the ordinance of North Wales. Section 1 provided:

"That after the passage of this ordinance it shall be unlawful for any person or persons to sell at retail by sample or otherwise, or to solicit orders at retail, or to solicit orders for, sell, or deliver at retail, either on the streets or by traveling from house to house within the limits of the borough of Sunbury, any books, paintings, foreign or domestic goods, wares, merchandise, or fruits, not of their own manufacture or production, without first obtaining from the chief burgess of the borough of Sunbury a license for such purpose."

In April, 1902, the Supply Company (whose agents had been soliciting orders and delivering goods in the borough without a license) undertook by the hands of Rearick, one of these agents, to deliver certain brooms in fulfillment of previous orders. The secretary of the merchants' association believed that the original packages had been broken, and that the brooms were no longer protected by the commerce clause of the Federal Constitution. Accordingly he directed the captain of the borough police to prosecute Rearick for violating the ordinance, and a fine was imposed by a justice of the peace. Upon appeal the quarter

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sessions of the county affirmed the conviction, and the Superior Court in a careful and elaborate opinion (*Commonwealth v. Rearick*, 26 Pa. Super. Ct. 384) affirmed the judgment of the quarter sessions. The Supreme Court of Pennsylvania refused permission to appeal (practically affirming the Superior Court), and the case was thereupon removed to the Supreme Court of the United States, where the judgment was reversed in December, 1906. *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. 159, 51 L. Ed. 295. The details of the controversy are not important. It is enough to say that the transport of the brooms for the purpose of filling the orders was held to be protected commerce. After several years of litigation it thus appeared that four tribunals of the State held one opinion, while the Supreme Court held a different, but, of course, the dominant, opinion, concerning the same transaction. The association had no doubt been wrong, but certainly no one can affirm that the question was not fairly debatable. Two years later the present suit was brought charging certain members of the association with combining to restrain interstate commerce. It is argued that the combination was sufficiently proved—or at all events that a jury might so find—by the facts that the secretary directed the arrest of Rearick under the ordinance and that the association defended the proceeding before every tribunal that considered it. No evidence was offered to show impairment of the Supply Company's trade in Sunbury, and the claim for damages was limited to three times the fees and other expenses of the litigation.

This situation does not call for extended comment. So far as appears, the defendants had nothing to do with the passage of the ordinance (even if this were important in the present case). The single allegation is that as they combined to enforce it against the Supply Company they combined necessarily to restrain commerce unlawfully between the States in question. It may perhaps be noted that the company's general right to make interstate shipments was not denied by the defendants. They merely attacked the particular shipment of brooms because in their opinion

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these articles had lost the protection of the original package and had become part of the general mass of property in the borough, over which the ordinance could exercise control. Of course, an ordinance that conflicts with the commerce clause must ultimately give way; but we cannot assent to the proposition that two persons cannot combine in good faith to take action in the courts under such an ordinance without being exposed to the sanctions of the Anti-Trust Act. A citizen has a right to act in good faith upon the belief that a law or an ordinance passed by constituted authority is valid. Prima facie it is valid, and although his belief may no doubt be erroneous now and then, and he may have his labor and cost for his pains, we think it clear that even then he is not to be treated as a deliberate wrongdoer. We cannot suppose that the general words of the Anti-Trust Act were intended to include an agree[ment] in good faith to test a municipal ordinance in the courts. Such a construction would impose an extraordinary burden upon the citizen, and could only be justified by unmistakable language. It would require very plain speaking to make us believe that Congress had said, in effect, that citizens while acting in good faith to redress the violation of an ordinance prima facie valid, or even of fairly doubtful validity, must anticipate the decision of some ultimate tribunal, and must do so at the risk of being fined or imprisoned if their forecast should be wrong. The policy of the law encourages the peaceful settlement of disputes, and we see nothing in the conduct of the merchants' association that was deserving of blame. In good faith and on plausible grounds they believed the law to be with them, and they had a right to try out such a controversy in the courts, although the litigation might be expensive for their antagonist as well as for themselves.

No precedent has been cited that supports the plaintiff's position; but on the analogous subject of false imprisonment there are numerous cases to the contrary. Plaintiffs have often been denied the right to recover damages, although they have been actually imprisoned for violating an invalid law or ordinance. 19 Cyc. 345; *Gifford v. Wiggins*, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; *Tillman v.*

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Beard, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; and other cases referred to in these citations.

The judgment is affirmed.

UNITED STATES TELEPHONE CO. v. CENTRAL UNION TELEPHONE CO. ET AL.

(Circuit Court of Appeals, Sixth Circuit. January 10, 1913.)

[202 Fed. Rep. 68.]

COURTS (§ 365)—FEDERAL COURTS—DUTY TO FOLLOW STATE COURT DECISION.—The obligation of a Federal court to follow the decisions of State courts does not arise, unless the State court is a court of last resort, particularly where the opinions of the lower courts are not unanimous or numerous and old enough to show a settled rule.*

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.

Conclusiveness of judgment between Federal and State courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan* 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis* 49 C. C. A. 468.]

[67] MONOPOLIES (§ 10)—PUBLIC POLICY—FEDERAL AND STATE POLICY.—In general, the policies of the State of Ohio and of the United States regarding monopolies and restrictions of competition are the same; the rule being that of the common law, declared for Ohio by the Valentine Act (Rev. St. 1908, § 4427-1), and for the United States by the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 9; Dec. Dig. § 10.

Monopolistic contract, validity as affected by public policy, see note to *Cravens v. Carter-Crume Co.*, 34 C. C. A. 486.]

MONOPOLIES (§ 20)—COMBINATIONS PROHIBITED—TELEPHONE COMPANIES—LOCAL AND LONG-DISTANCE COMPANIES—CONNECTIONS—EXCLUSIVE RIGHTS.—A contract between a local telephone company and a long-distance company for a connection between their lines and the use of the local lines for the sending and receiving of long-distance messages, binding the local company not to permit any similar connection by any other long-distance company for a term of 99 years, thereby disabling it from giving its subscribers the benefit of competition in long-distance service and from extending its own service as authorized by its charter, was invalid, as tending to create a monopoly.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 20.]

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TELEGRAPHS AND TELEPHONES (§ 28)—POWERS—EXTENSION OF LINES.—Under Rev. St. Ohio 1906, § 3455, conferring on telephone companies the power to extend their lines whenever and wherever the needs of the service and good business policy may dictate, the duty of a company to furnish reasonably adequate service is not confined to the date of its organization, but it is bound to keep pace with changing conditions as they may occur from year to year; and a contract disabling it from furnishing what may be adequate service is invalid.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 16, 17; Dec. Dig. § 28.]

TELEGRAPHS AND TELEPHONES (§ 36)—LONG-DISTANCE SERVICE—ADEQUACY.—Long-distance telephone service is not necessarily reasonably adequate because it reaches the city or district of residence of the person with whom communication is desired.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 26, 31; Dec. Dig. § 36.]

MONOPOLIES (§ 20)—CONSOLIDATION BETWEEN PUBLIC SERVICE CORPORATIONS.—Statutory power to consolidate with or purchase another company will not justify a general system of contracting with a great number of other companies for exclusive mutual relation.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 20.]

MONOPOLIES (§ 20)—RESTRAINING COMPETITION—EXCLUSIVE CONTRACTS.—A general system of exclusive contracts *prima facie* restraining competition might be justified if they are for a term not beyond any such necessity, as a 99-year contract for exclusive interchange of telephone business.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 20.]

Appeal from the Circuit Court of the United States for the Northern District of Ohio; Robert W. Tayler, Judge.

[68] Suit in equity by the United States Telephone Company against the Central Union Telephone Company and another. From a decree dismissing the bill (171 Fed. 130), complainant appeals. Affirmed.

During the period prior to 1898 the Central Union Telephone Company had established a system of long-distance telephone communication extending over large parts of the States of Ohio and Indiana. It also owned and controlled local telephone exchanges in many cities and villages in this territory. The American Telephone & Telegraph Company, by license or stock ownership or otherwise, controlled the Central Union, so that the latter, with its local exchanges and long-distance lines, became allied to, and in a sense a part of, the so-called Bell system, extending throughout the United States. At the same time there also existed, in the two States named, a large number of so-called independent local telephone exchanges, often operating a

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local exchange in direct competition with the local exchange of the Central Union, at the same place, but not amounting to a completely competing system, because the independent local exchanges were not generally connected with each other by long-distance lines, and hence could not give to their patrons long-distance service. It was the established practice and rule of the Central Union not to permit its long-distance lines to be used by or for the local independent exchanges, and it thus promoted its own local business by offering in connection therewith long-distance service which local competitors could not give. The bill alleges, and it is now to be taken as true, that this conduct and policy of the Central Union Company were intended for, and were effective toward, unfairly suppressing competition and oppressively establishing a monopoly in the telephone business.

In this situation the United States Telephone Company was organized as an independent long-distance company, for the purpose of furnishing long-distance service to the independent exchanges in the two States named and adjacent territory. It proceeded to, and did, expend several million dollars in the construction of such lines, and in connection with this planning and development it negotiated and made contracts with a large number of independent local exchanges in Ohio, Indiana, and Michigan, which contracts provided for an interchange of business, "so that a comprehensive and adequate independent telephone system was thereby created." This independent system thereupon entered into and carried on a general telephone business, competing with the Bell system in the territory named, and in about 1907 it had been so successful that it was furnishing long-distance service for 800 independent exchanges, 2,000 independent stations, and 700,000 telephones. Up to the time last named the Central Union Company had adhered to its policy of refusing to furnish service to independent exchanges, but at about that time it abandoned that policy, in whole or in part, and began to solicit an exchange of business with the local independent companies; in other words, the Central Union Company entered into active competition with the United States Company for the long-distance business of the independent local exchanges. The contracts above named, between these exchanges and the United States Company, provided that for points reached by that company they should give their long-distance business exclusively to that company and receive long-distance business from that company alone, so that this new policy of the Central Union Company amounted to soliciting the independent exchanges to break their contracts with the United States Company. Several independent exchanges accepted the offers made by the Central Union Company, and entered into interchange arrangements with it.

Against two or three of such independent local exchanges, the United States Company filed injunction complaints, and obtained injunctions in the common pleas court of Ohio. The Central Union

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Company continuing such solicitation, the United States Company filed this bill in the United States Circuit Court for the northern District of Ohio, asking an injunction against the continuance of such acts. The defendants demurred, and the Circuit Court dismissed the bill. The United States Company appealed to this court. The hearing of the appeal was long delayed, awaiting the decision of the Supreme Court of Ohio; but that decision, when rendered, was not controlling, as [69] hereafter explained, and accordingly the appeal has been argued and submitted to this court.

W. L. Cary, of Columbus, Ohio, and *Cable & Parmenter*, of Lima, Ohio, for appellant.

John H. Doyle, of Toledo, Ohio, *Murray Seasongood*, of Cincinnati, Ohio, and *W. B. Mann*, of Indianapolis, Ind. (*Paxton, Warrington & Seasongood*, of Cincinnati, Ohio, and *Doyle & Lewis*, of Toledo, Ohio, of counsel), for appellees.

Before **KNAFFEN** and **DENISON**, Circuit Judges, and **SATER**, District Judge.

DENISON, Circuit Judge (after stating the facts as above):

After the decision of the present case by Judge Tayler in the court below, an appeal from the common pleas court, in one of the injunction cases, was affirmed by majority vote of the circuit court (in Ohio, an intermediate appellate court). This was carried to the Supreme Court. The Supreme Court of Ohio has six members. Five sat to hear this case, and the decree of the circuit court was affirmed by a vote of three to two, but without any opinion. It is the fixed rule of the Supreme Court in Ohio that the law, as settled by the decision, is to be found only in the syllabus. *Adelbert College v. Wabash R. R. Co.* (C. C. A. 6) 171 Fed. 805, 812, 96 C. C. A. 465, 17 Ann. Cas. 1204. Under these circumstances, it is said that we should not examine for ourselves the questions involved, but should adopt the same disposition of the matter as was reached in the Ohio Supreme Court.

[1] Counsel do not agree as to whether the action of the State courts was in such sequence of events, or whether that action so involved the construction of the State statutes or State policy only, rather than Federal statutes or matters of

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general law, that it would be our duty to adopt the conclusion of those courts; but we see no necessity for considering that problem. It is clear that the obligation to follow the lead of the State courts does not arise, unless the court to be followed is the court of last resort in the State (*Anglo-American Co. v. Lombard* [C. C. A. 8], 132 Fed. 721, 742, 68 C. C. A. 89); and particularly so when the lower court opinions are not unanimous or numerous and old enough to show a settled rule. We think we must interpret the action of the Supreme Court of Ohio as a declaration that, lacking concurrence by a majority of the court, it was unwilling to lay down any general rules or principles as applicable to the existing situation. Under these circumstances, we feel bound to decide the issues according to our own judgment.

The court below based its conclusion largely upon the ground that the exclusive feature of the contracts between the independent locals and complainant was in itself unlawful and void, as tending to unlawful trade monopoly. If that court was right in this, all the other questions argued become immaterial, and so that question is naturally the first to be considered. This necessitates a more careful statement of this feature of the contracts.

Taking one of the contracts as typical, we find that the long-distance company (complainant) agrees to build a line to the corporate [70] limits of the village, and thence upon the poles of the local company to its central exchange in the village, receiving a license to use therefor the poles of the local company's village lines; that service will be given from all lines owned, controlled, or connected with the lines of either party over the lines of the other party and its connections; that neither party will enter into contract with any other person or corporation whereby any of the rights, privileges, or advantages acquired by this contract might be impaired; that the long-distance company will transmit, over the lines owned or controlled by the local company, all messages destined to points thereon, and not reached by the long-distance company's own lines; that the local company will transmit over the lines of the long-distance company all messages to points "not now reached" by the local company's own lines (as shown by the attached plat of existing

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local lines); that the tolls and charges shall be divided in agreed proportions; and that the contract shall remain in force for 99 years.

[2] Speaking generally, the policies of the State of Ohio and of the United States regarding restrictions of competition are the same; if there are differences, they are immaterial here. The rule is that of the common law, declared for Ohio by the Valentine Act, and for the United States by the Sherman Act. *Salt Co. v. Guthrie*, 35 Ohio St. 666; section 4427—1, R. S. Ohio; *Standard Oil Case*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200); *State v. Buckeye Pipe Line Co.*, 61 Ohio St. 520, 548, 56 N. E. 464; *State v. Gage*, 72 Ohio St. 210, 73 N. E. 1078. That any particular class of business should be exempted from this prevailing policy would require clear and explicit legislative declaration to that effect. The courts cannot make such exemptions, merely because forceful reasons can be stated why such particular business is a "natural monopoly." If it is, this only means that the legislature might well have made an exemption, or, at most, that in a judicial determination of what amounts to a substantial and direct restraint, rather than an incidental or indirect restraint, the courts will give due regard to the character of the business under consideration. Of the present situation, it is enough to say that we are cited to no Ohio statute in force when this controversy arose expressly exempting telephone companies from the general policy adopted by the State for other kinds of business; nor is there any such exemption in the Federal statutes.

It also seems clear, and is not denied, that the carrying on of telephone business is trade and commerce within the proper meaning of those terms, and one of the kinds of business in which it is the general purpose of the law that all citizens should be at liberty to engage on equal terms.

[3] With these premises, the prima facie restrictive character and monopolistic tendency of the contracts in question can hardly be denied. The local company has tied up its long-distance business. It can not take general advantage of competition from time to time arising, no matter how

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advantageous to it or its patrons, and it can not [71] expand its own business and extend its own lines beyond its then existing limits into competition with the long-distance company, no matter how advisable such extension and competition might prove to be. This is from the standpoint of the local exchange, but similar results are apparent from the other standpoint. The long-distance company not only forestalls competition likely to arise through the extension of the local company's lines, but by its system of these contracts there was a direct plan and effort to monopolize in the long-distance business so much of the field as it could cover. A general system of contracts may be obnoxious to an antitrust law, though the individual contract would not be. *United States v. Reading Ry.*, 226 U. S. 324; 33 Sup. Ct. 90, 57 L. Ed. 243. These contracts, therefore, must be condemned because "adopted for and adapted to" a restraint of trade and monopoly, unless they escape that condemnation for the reasons hereafter to be considered.

[4] Another consideration leads to the same result: These local exchanges, organized under the Ohio statutes, were public service corporations bound to give reasonably adequate service. *Cumberland, etc., Co. v. Kelly* (C. C. A. 6), 160 Fed. 316, 87 C. C. A. 268, 15 Ann. Cas. 1210; *Postal Co. v. Cumberland Co.* (C. C.), 177 Fed. 726. It is true that they were not charged with an express duty to give long-distance telephone service, but neither were they confined to strictly local service. They had power to extend their lines whenever and wherever the needs of the service and good business policy might dictate (sec. 3455, R. S. Ohio), and their obligation to furnish reasonably adequate service is not confined to such exact definition of that term as might have been given at the time of the organization. Every such charter contemplates that conditions will change from year to year and from decade to decade, and that the obligation of the company shall be to give that service, which, at the future time when the question arises, is then, and in view of the conditions then existing, reasonably adequate.

* Judge Knappen's phrase in *Bigelow v. Calumet & Hecla Co.* (C. C.), 155 Fed. 869, 875.

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It is now a matter of common knowledge that long-distance communication is a practical necessity to the perfection of the service rendered by a local exchange to its subscriber, and this situation, while not as clear and certain in 1900 as it is in 1912, must be deemed to have been then within the contemplation of the parties and of the law.

[5] A long-distance telephone service is not necessarily reasonably adequate just because it reaches the city or district of residence of the person with whom communication is desired. A railroad service may be beyond criticism if all passengers and freight are delivered at one station in a city, from which station the passengers go their several ways, and to which station consignees come for their freight; a telegraph service may be complete if the messages reach over the wire only one central office, from which they are distributed by other means; but in telephone communication the ultimate thing sought is personal conversation, and a long-distance telephone service has not reached its full usefulness until the user, in one place, can talk directly with the [72] residence or place of business of the telephone users in another place. It is not now important where the line will be drawn in determining what is reasonably adequate service. That will depend upon many conditions, some of which can not be foreseen. It is enough to say that where a local telephone company contracts that it will not send or receive *any* long-distance messages, excepting in coöperation with one specified long-distance company, it thereby abdicates its power to give a service which may turn out to be clearly within any proper definition of "reasonably adequate."

Nor are we concerned with the question whether the local exchange could, in 1900, have been compelled, or might now be compelled, to give this long-distance service against its will. We consider only the fact that by these contracts the local companies partially disabled themselves from performing what might become a portion of their public duties, and hence, for that reason also—and unless the controlling justification appears—the contracts are invalid.

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[6] We come, then, to the inquiry whether there is sufficient reason for exempting these contracts from their prima facie invalidity; and the first point urged to this effect is that, by statute, the long-distance company and the local company each had power to purchase and consolidate with the other, and that, as the greater includes the less, this power of consolidation necessarily implies the power to contract for exclusive, mutual relations. The statutes did give this power of purchase or consolidation (section 3455, supra); but such general powers must be construed as subordinate, not paramount, to specific prohibitions of monopolistic combination (*Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48, L. Ed. 679). Nor does the power to consolidate or combine with another company reach to a system of identical or similar contracts with hundreds of other companies, resulting in a general combination. The essential evil may be in the system, but not in the single contract.

Further, on the subject, as Judge Tayler said below:

"The fallacy of this particular contention is to be found in the fact that the lessee or consolidated company is not by the act of lease or consolidation disabled to perform any of its duties which by law may have rested on the lessor or constituent company. There still remains in either case—lease or consolidation—a company operating the local telephone system, and upon it rests, as formerly rested on the constituent local company, the duty which the law laid upon it. Whatever may be the temper or the policy of the successor company, respecting the matter of continuing to monopolize the local and long-distance business of the community, it will not by such lease or consolidation have parted with the power to give competitive service. Thus it will continue to have power to satisfy the legal necessities springing out of the fact that it is a corporation."

It will be noticed that these exclusive contracts have the effect, not only to require the local company to give its long-distance business to the United States Company as against any long-distance competitor like the Central Union, but also to prohibit the local company from extending its own lines in competition with the United States Company. As will be seen from the statute cited, it had the charter power to extend its own lines wherever the good of its stockholders and the [73] benefit to the public might, from time to time, dic-

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tate. So far as such extensions might compete with the lines of the United States Company, then or thereafter established, this power of extension was, by the contracts, abrogated. This consideration adds force to the extract just quoted from Judge Tayler's opinion.

[7] It is next urged that these contracts should be approved because, in spite of their restrictive and monopolistic tendencies, their net character tended in the contrary direction, so that they really promoted, instead of restraining, competition. This is because, in 1900, the long-distance field, so far as occupied at all, was exclusively held by the Central Union Company, which (the demurrer admits) was a monopoly maintaining its position by unlawful means, and because it was impossible to promote and establish a competing long-distance system unless that system was in advance assured of business from independent exchanges, which assurance could be had only by exclusive contracts. We consider this argument as depending upon the principles which have been most recently discussed by Mr. Justice Lurton, in the Reading Case (*supra*) with reference to the 65 per cent contracts, and it amounts to saying that the restraint and monopoly found in these telephone contracts were not their main and characterizing purpose and effect, but were the indirect and necessary incidents of contracts which operated primarily for promoting competition—hence, they can not be condemned. It may well be that if a system of monopoly is found so entrenched that competition can not get a start, except by providing itself in advance with a system of exclusive contracts, then, in such case and in so far as this is necessary to get competition, the exclusive contracts may become a mere incident of the generally lawful enterprise. However, it is clear that this exemption can not go beyond the necessity of the case, and the bill in this case indicates no necessity requiring or justifying 99-year contracts. These are practically perpetual contracts. Within that period, the entire subject matter might, and very likely would, change its essential character over and over again. We can not undertake to suggest the term of exclusive contract which would be reasonable,

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so as to permit the use of such a means for getting a rival company into the field. The term of a patent may furnish some analogy. Different circumstances may justify different terms. The term might be such as to make it very difficult to decide upon which side of the line it lay. We need not speculate about these things, because we are clear that the 99-year restriction found in these contracts goes far beyond any inherent necessity for the purpose suggested, and so can not be justified as properly incidental to a lawful purpose.

Several other reasons are urged for sustaining the validity of these contracts in spite of what we have called their *prima facie* invalidity, but we find none of these reasons as forceful as the two which we have discussed; nor does any one of the decisions which have been pressed upon us seem persuasive in opposition to the conclusions we have expressed. A review of these cases would be unprofitable. No one of them has reference to a system of hundreds of identical or similar contracts covering large parts of three States, running for a period of time which is practically perpetual, and operating to abrogate a [74] part of the powers of public service corporations, and covenanting that the powers not wholly abrogated shall not be exercised as they might otherwise have been and as may prove to be essential to giving good service and to avoiding monopoly. For example, in *Chicago, etc., Co. v. Pullman, etc., Co.*, 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97, a contract by the railroad to give to the Pullman Company the exclusive right to furnish sleeping cars to the railroad was sustained; but the contract was for a period of only 15 years, and contained an option by which, if unsatisfactory, it might be terminated in 5 years. Such a contract was, essentially, of a different character from those now involved, because of the entire practicability of exchanging long-distance telephone business with more than one company, contrasted with the practical difficulties which might attend the attempted use of the same railroad track for sleeping cars of different systems; but, aside from this practical distinction, the opinion does not indicate to us that the exclusive sleeping car contract would have been sus-

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tained if it had been for the period of 99 years, and if it had been one of a system of similar contracts covering or attempting to cover all the railroads in a large territory. The Supreme Court has also sustained exclusive contracts for hauling express cars (*St. Louis, etc., Co. v. Southern Exp. Co.*, 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791); but this is less analogous than the Pullman case. On the other hand, the view we take is supported, more or less perfectly, by *Beasley v. Texas Pac. Ry. Co.*, 191 U. S. 492, 497, 24 Sup. Ct. 164, 48 L. Ed. 274; *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583; *South Chicago, etc., Co. v. Calumet, etc., Co.*, 171 Ill. 391, 49 N. E. 576; *Central, etc., Co. v. Averill*, 199 N. Y. 128, 92 N. E. 206, 32 L. R. A. (N. S.) 494, 139 Am. St. Rep. 878; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

We are not unmindful that the result of affirming the decree below is to compel what is said to be the weaker of the two companies to defend itself against commercial aggression from the stronger by some other means than merely standing upon these contracts which it had provided for such defense; but, in applying rules of this kind, we must look to the future as well as to the present. Sustaining these contracts might, for the time being, aid the weaker and so help to maintain competition; but it would at the same time point the way by which, in case of the voluntary or involuntary combination of these two companies, all competition or possibility of competition would be, for 99 years, excluded. This entire phase of the question is so well stated by Judge Tayler that we quote with approval this part of his opinion:

"The position which counsel for complainant take comes to this when we analyze it: The Bell Telephone Company is a wicked monopoly. Some years ago the United States Company concluded to fight it. The only way to fight the devil was with fire. The only way to fight the monopoly was to monopolize all unoccupied territory. The way to monopolize this unoccupied territory was to go to a local telephone company which had no long-distance connection and offer to give it such a long-distance connection, provided a perpetual monopoly of it was given in return.

"This purpose to destroy the Bell monopoly may be admitted to be virtuous. The method resorted to was vicious. It was a mere repeti-

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tion and imitation [75] of the methods which, when followed by the Bell Company, are so bitterly denounced. The philosophy that the end justifies the means, when the end is virtuous and the means vicious, has long since been discarded, if it ever had any avowed supporters. But even that philosophy can not apply to a mere business undertaking. The purpose to destroy the telephone monopoly was not a virtuous purpose; it was a business proposition, which incidentally led, we may assume, to a righteous result. What becomes of the righteous result when the means to accomplish it are the means of unrighteousness? The ultimate result of which may be that we discover we have exchanged one master for another, or if not, that we have emphasized the strength of the former master. Counsel, of course, will not deny that if the Bell Company should acquire control of the complainant, these contracts would be just as valid and the shield of our defense would be turned into a weapon with which to destroy us.

"Are the courts to turn themselves into inquisitors of the minds of men and say: 'Here is a man who wants to do the world some good? The ultimate result promises to be beneficial, but, in order to accomplish it, he must monopolize the business of some community and must violate the law. May he do so?' These questions were long ago answered, and yet they come up again and again.

"The sum of all this is that it does no good to destroy one monopoly by creating another. Monopolies all look alike to the law. When they use their power unlawfully, it is for the law to take suitable steps to punish the offender and prevent recurrence of the offense."

The decree below is affirmed, with costs.

**UNITED STATES v. HAMBURG-AMERIKANISCHE
PACKET-FAHRTACTIEN-GESELLSCHAFT ET
AL.***

(Circuit Court, S. D. New York. December 20, 1911.)

[200 Fed. Rep. 806.]

COMMERCE (§ 47)—FOREIGN COMMERCE—INTERNATIONAL TRANSPORTATION OF PASSENGERS—REGULATION.—The transportation of passengers between the United States and Europe forms a part of the commerce of the United States with foreign nations subject to congressional regulation, under which right Congress has power to

* For later opinions (216 Fed. 971), see *post*, page 897; (239 U. S. 406), see *post*, page 908.

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prohibit all contracts, combinations, and conspiracies in restraint of such commerce.*

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 26; Dec. Dig. § 47.]

MONOPOLIES (§ 16)—FOREIGN COMMERCE.—A contract between steamship lines for division of steerage passenger transportation between the United States and Europe according to specified percentages, containing stipulations for the pooling of receipts and embracing provisions to secure its enforcement, and, while leaving the fixing of rates to individual discretion, providing that the holders of 75 per cent of the shares of traffic might direct any party to raise or reduce its charges, directly and materially affected foreign commerce, and since, with reference to east-bound traffic, the actual commencement of the transportation was within the territory of the United States, the contract was an unlawful combination and conspiracy, in violation of the Federal Anti-Trust Act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

MONOPOLIES (§ 16)—FOREIGN COMMERCE—ILLEGAL CONTRACT.—Where a contract for international transportation of steerage passengers between the United States and European ports constituted an illegal combination and conspiracy, in violation of the Federal Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and was in restraint of foreign trade and commerce, materially affecting the foreign commerce of the United States, and was intended to be put into force there, it was immaterial where it was entered into, or that it was to be carried out or performed in foreign countries, or by the use of foreign vessels.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

In equity. Suit by the United States against the Hamburg-Amerikanische Packet-Fahrt-Actien-Gesellschaft and others. On demurrer to the bill for want of equity. Overruled.

The bill was filed by the United States under the Federal Anti-Trust statute, to restrain a further execution of an agreement between certain steamship companies for the formation of an association, called the "Atlantic Conference," relating to the carriage of steerage passengers between the United States and Europe.

Henry A. Wise, U. S. Atty., of New York City.

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Burlingham, Montgomery & Beecher; Lord, Day & Lord; Choate & Larocque; Spooner & Cotton; and A. L. & S. F. Jacobs, all of New York City, for defendants.

Before LACOMBE, COXE, WARD, and NOYES, circuit judges.

NOYES, circuit judge.

[1] It may be accepted without discussion that transportation of passengers between this country and Eu-[807] rope forms a part of the commerce of the United States with foreign nations. It is also clearly established that Congress has power to prohibit all contracts, combinations, and conspiracies in restraint of such part of the foreign commerce of the United States. The real question here is not one of power but of interpretation. The inquiry is whether that which is charged against the defendants comes within the provisions of the Anti-Trust statute and this inquiry has two phases:

(1) Does the agreement in question directly and materially affect foreign commerce?

(2) Does such agreement with the acts stated in the petition amount to an unlawful contract, combination, or conspiracy?

[2] The agreement affects foreign commerce because its operation must necessarily divert a part thereof, viz, the business of carrying steerage passengers from the natural channels of free competition into fixed channels assigned to the parties. The different lines obtain not that which would come to them from their separate efforts but prescribed and certain percentages of the traffic.

The agreement directly and materially affects foreign commerce and is partly intra-territorial because it is to be carried out in part in the United States. Confining ourselves to east-bound traffic, it is evident that the contract contemplates the solicitation of business, the making of contracts of carriage, the taking on board of passengers, and the actual commencement of transportation within the territory of the United States. It requires acts to be done in this country; such acts are as material and essential as

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those to be performed abroad, and the part of the contract requiring them can not be separated from the remainder.

The prohibitions of the Anti-Trust statute apply broadly to contracts in restraint of trade or commerce with foreign nations. This contract directly and materially affects such commerce, and if it unlawfully restrains it, it comes within the statute. We see nothing to warrant the contention that the act should be narrowly interpreted as prohibiting only contracts which are to be performed wholly within the territorial jurisdiction of the United States nor—if it were for us to consider—any reason for concluding that a broader construction would lead to international complications.

[3] As the contract directly and materially affects the foreign commerce of this country by being put into effect here, it is immaterial where it was entered into or by what vessels it was to be, or has been, performed. Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purpose. Such combinations are to be tested by the same standard as similar combinations entered into here by citizens of this country. The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce? As said by the Circuit Court of Appeals for this circuit in *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251, 92 C. C. A. 315:

“That the combination was formed in a foreign country is likewise immaterial. It affected the foreign commerce of this country and was to be put into operation here.”

[808] The final inquiry is whether the acts and agreements of the defendants as set forth in the petition in addition to materially and directly affecting foreign commerce, restrain it within the meaning of the statute. This inquiry requires the examination of the second phase of the question with which we started, and it is whether such acts and agreements amount to an unlawful contract, combination, or conspiracy.

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The petition states the contract at length. It shows a division of traffic into stated percentages, contains stipulations for the pooling of receipts, and embraces provisions to secure its enforcement. In general, the fixing of rates is left to individual discretion, although the holders of 75 per cent of the shares of traffic may direct any party to raise or reduce its charges.

The petition, after stating the contract, shows the methods adopted by the associated defendants in fighting competitors and in forcing them out of business, and charges unfairness and oppression. It further alleges that the defendants in carrying out the combination have charged excessive and arbitrary rates to the public. It also alleges that by the contract and the practices thereunder the defendants have obtained a virtual monopoly of that part of the foreign commerce of the United States included within the scope of the combination.

Testing the petition by the allegations which it contains, as must be done upon demurrer, it is clear that—the effect upon foreign commerce being shown—the averments make out a combination and conspiracy in violation of the Anti-Trust statute. Whether or not the statute is directed against all combinations in restraint of competition, it is certain that it embraces those in which the purpose and effect are to charge arbitrary and excessive transportation rates. Whether the statute be broadly or narrowly construed, it is clear that it prohibits combinations and conspiracies to restrain the business of transporting passengers when accompanied with acts of oppression and attempts to monopolize.

The demurrers of the defendants are overruled with costs, and they are assigned to answer by the February rule day.

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UNITED STATES *v.* HAMBURGH-AMERICAN S. S.
LINE ET AL.*

(District Court, S. D. New York. October 13, 1914.)

[216 Fed. Rep., 971.]

MONOPOLIES (§ 16).—COMBINATION BETWEEN STEAMSHIP COMPANIES.—
VIOLATION OF ANTI-TRUST ACT.—The employment by a combination of steamship companies engaged in the trans-Atlantic passenger business of so-called "fighting ships," or extra vessels, which, when a vessel not owned by a member of the combination, made lower rates than one which did, was placed at a berth near such vessel, and met or went below such rates, *held* to constitute an undue and unreasonable restraint of foreign trade and commerce, and an attempt to monopolize such commerce, in violation of Anti-Trust Act, July 2, 1890, c. 647, §§ 1, 2, 26 Stat., 209 (U. S. Comp. St. 1901, p. 3200); but the exaction by the members of the combination of agreements by their agents to sell passage tickets for such members only, or the division of the business between the members in a pre-determined proportion, *held* not a violation of the act.^b

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.]

In Equity. Suit by the United States against the Hamburg-American Steamship Line and others. Bill dismissed as to two defendants, and decree for complainant for part of the relief prayed for against the other defendants.

This is a proceeding in equity under the Anti-Trust Act to terminate and dissolve a combination of various trans-Atlantic steamships engaged in the transportation of passengers. The transactions complained of are concerned mainly with the transport of steerage passengers.

H. Snowden Marshall, U. S. atty., and *Henry A. Guiler*, Asst. U. S. Atty.

Spooner & Cotton, of New York City (*John C. Spooner*, of New York City, of counsel), for Hamburg-American Line, Allan Line, and Canadian Pac. Ry. Co.

* For prior opinion of the District Court (200 Fed., 806), see *ante*, page 892.

For opinion of the Supreme Court (239 U. S. 466), see *post*, page 908.

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Choate & Larocque, of New York City (*Joseph Larocque* and *Nelson Shipman*, both of New York City, of counsel), for North German Lloyd and defendants Schwab and others.

Burlingham, Montgomery & Beecher, of New York City (*Charles C. Burlingham*, *Norman B. Beecher*, *Charles Burlingham* and *Roscoe H. Hupper*, all of New York City, of counsel), for American Line, Anchor Line, Dominion Line, Holland-America Line, Red Star Line, White Star Line, and defendants Franklin, Coverly, and Gips.

Lord, Day & Lord, of New York City (*Lucius H. Beers* and *Allan B. A. Bradley*, of New York City, of counsel), for Cunard S. S. Co., Limited, and defendant Sumner.

Ralph J. M. Bullowa, of New York City, for Russian-American Line and defendants Johnson and Strauss.

Before LACOMBE, COXE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge.

The writer's opinion as to what, under prior decisions, was the construction to be given to the Sherman [972] Anti-Trust Act, will be found fully set forth in *U. S. v. American Tobacco Co.* (C. C.), 164 Fed. 700. If that construction were followed in this case, there could be no doubt as to the conclusion to be reached upon the facts proved. It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with, so that the proportions of it carried by the various lines which have so combined are not as they would be if full, free, and unrestricted competition were the sole controlling power to effect the distribution.

Since the decision above cited, however, there have been two exhaustive opinions of the Supreme Court dealing with this act. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*,

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221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. The effect of these would seem to be that contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act unless such restraint or interference is "unreasonable" or "undue."

"Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs, which it was thought would flow from the undue limitation or competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. * * * The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." *Standard Oil Co. v. United States*, 221 U. S. 58, 59, 60; 31 Sup. Ct. 515; 55 L. Ed. 619; 34 L. R. A. (N. S.) 834; Ann. Cas. 1912D, 734.

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." *United States v. American Tobacco Co.*, 221 U. S. 179, 31 Sup. Ct. 648, 55 L. Ed. 663.

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[973] To determine whether any particular course of conduct is or is not "undue" or "unreasonable" involves, of course, a consideration of all the surrounding circumstances, which may be multifarious. Moreover, opinions will sometimes differ as to what should be the answer to such a question. Upon a given statement of facts 12 unprejudiced jurymen will sometimes unanimously reach the conclusion that the conduct of an individual evidenced "due" and "reasonable" care and prudence, when upon the same state of facts 12 other unprejudiced jurymen will unanimously reach a different conclusion. Courts have recognized this uncertainty, for it has been frequently held in actions for negligence that although a judge may direct an appropriate verdict, when all intelligent minds would agree as to the inference to be drawn from proved facts, he should send the cause to the jury whenever there might be an honest difference of opinion as to whether the conduct of an individual exhibited "due" and "reasonable" care and prudence. So, too, when a question arises in an equity court as to the "reasonableness" of certain transactions different chancellors may differ in their answers. Thus in *United States v. Periodical Clearing House*, a litigation arising under the Sherman Act and involving certain regulations made by what was known as the "Magazine" or "Periodical Trust," this court was evenly divided in opinion as to whether such regulations were reasonable or not.*

Referring now to the facts in proof: One of the matters complained of is what is called in the testimony the providing of "fighting ships." Upon occasions when some steamship owner or charterer, not a member of the combination, has put a vessel on a berth adjoining one from which vessels of a member of the combination were about to sail, and has offered to carry passengers at a lower rate than that asked by such member, an extra vessel has been put on, ostensibly by one of the lines in the combination, but really by the combination itself, at the same or a lower rate, and

* Decided March 22, 1913, by dismissal of complaint, for the reason that the Government had failed to satisfy a majority of the court that it was entitled to the relief prayed for; not reported, as no opinions were filed.

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all have coöperated to furnish such a "fighting ship" and thereby keep out the competitor. This seems clearly to be within the prohibition of the act; the case is analogous to that presented in *United States v. Eastern States Retail Lumber Dealers' Association*. In that case some wholesale lumber dealers, learning the names and addresses of the customers of retail dealers who bought from them, had taken away such customers by offering to sell them direct at wholesale prices. An individual retail dealer, who had thus lost customers, was of course free to give information of his experience to any of his business associates; but an association of retail dealers which gathered such information and circularized the retail trade with a list of the names of the wholesalers who had done so was held to be a combination to boycott or blacklist, and a decree was entered in this court enjoining the further preparation and issuance of such circulars, which decree was affirmed on appeal. 201 Fed. 581; 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490.

[974] The testimony (which is voluminous) fails to satisfy us that the defendants, or any of them, have charged excessive or exorbitant rates for the transportation of passengers of any class, especially when it is considered that vastly more in the way of safety, speed, sanitary conditions, physical comfort, etc., is now given to the passenger than was given to him before these agreements and conferences were entered into.

Much is made in argument of the circumstances that members of the combination employ only agents who will agree to confine their business to selling passage tickets for such members. When the deplorable conditions which existed before this method of business was adopted are considered, it would seem that such an arrangement has greatly benefited the traveling public, especially the more ignorant class of many different nationalities which travels in the third class or steerage. Moreover, dealing as it does merely with the control of defendants' agents, who are free to accept or decline such agency, it is analogous to the case which was presented in *United States v. Periodical Clearing House, supra*, where, upon the question whether or not such control of agents was or was not within the act, this court

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was divided in opinion and dismissed the bill. No attempt was made to review that decision on appeal. It is thought, therefore, that complainant has not shown itself entitled to relief on this branch of the case.

The main subject matter of the controversy, viz, the controlling of transportation so as to allot proportionate shares of it to the different defendants who are in the combination, has recently been most exhaustively considered by the standing committee on Merchant Marine and Fisheries under resolutions of the House of Representatives in Congress. It is manifest from its report that the committee had before it substantially the same evidence which is contained in the record in this case. There is nothing to add to the elaborate presentation of all sides of the controversy which will be found in that report, and we find it most persuasive to the conclusion that, in view of the peculiarities of ocean transportation, the method adopted by the defendants—if purged of its obnoxious feature, the “fighting” ship—is a reasonable one, which, so far from restraining trade, really fosters and protects it, by giving it a stability which insures more satisfactory public service for all concerned. Without this method, or something like it, there would be, in the language of the committee, one or other of two results:

The lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or to avoid a costly struggle they would consolidate through common ownership. Either would mean monopoly fully as effective, and it is believed more so, than can exist by virtue of [this] agreement.

It seems, therefore, that this particular combination comes fairly within the exception to a strictly literal construction of the statute, which is indicated in the Standard Oil and Tobacco cases.

The Allan Line and Canadian Pacific Line withdrew from the fighting-ship agreement before the bill was filed. As to both these defend[ants] the bill is dismissed. As to the other defendants, injunction will issue against the continuance of the “fighting ships,” and as to the other prayers for relief, the bill is dismissed. Since the Government has not prevailed on the main part of the case, the decree will be without costs.

Syllabus.

UNITED STATES OF AMERICA *v.* HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN-GESELLSCHAFT.*

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN GESELLSCHAFT, APPELLANTS, *v.* UNITED STATES OF AMERICA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 289, 332. Argued November 8, 4, 1915.—Decided January 10, 1916.

[239 U. S., 466.]

This court can not pass upon questions which have, as an inevitable legal consequence of the European war now flagrant, become moot. This court takes judicial notice of the European war and that its inevitable consequence has been to interrupt the steamship business between this country and Europe.^b

It is a rule of this court, based on fundamental principles of public policy, not to establish a rule for controlling predicted future conduct; and it will not decide a case, involving a combination alleged to be in violation of the Anti-Trust Act, which has become moot as a legal consequence of war, because of probability of its being recreated on the cessation of war. *California v. San Pablo R. R.*, 149 U. S. 308.

The power of this court can not be enlarged or its duty affected in regard to the decision of a moot case by stipulation of parties or counsel.

Where a case to dissolve a combination alleged to be illegal under the Anti-Trust Act has become moot and this court has thus been prevented from deciding it upon the merits, and the court below decided against the Government, the course most consonant with justice is to reverse, with directions to dismiss the bill without prejudice to the Government in the future to assail any actual contract or combination deemed to offend the Anti-Trust Act.

216 Fed. Rep. 971, reversed.

* For opinions of the District Court (200 Fed. 806), see *ante*, page 892. (216 Fed. 971), see *ante*, page 897.

^b Syllabus copyrighted, 1916, by The Banks Law Publishing Company.

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The facts, which involve the construction and application of the Sherman Anti-Trust Act of July 2, 1890, and the practice of this court in regard to cases which have become moot, and the effect of the legal consequence of war, are stated in the opinion.

Mr. G. Carroll Todd, Assistant to the Attorney General, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief for the United States.

Mr. Charles P. Spooner, with whom *Mr. John C. Spooner* and *Mr. James L. Bishop* were on the brief for Hamburg-American Steamship Company.

Mr. Lucius H. Beers, with whom *Mr. Allan B. A. Bradley* was on the brief for Cunard Steamship Company and others.

Mr. Charles C. Burlingham, with whom *Mr. Roscoe H. Hupper* was on the brief for American Line and others.

[468] *Mr. Joseph Larocque*, with whom *Mr. William G. Choate* and *Mr. Nelson Shipman* were on the brief, for North German Lloyd and others.

Mr. Ralph James M. Bullowa for defendants Johnson and Straus, agents of Russian East Asiatic Steamship Company, Ltd., submitted.

Mr. Chief Justice WHITE delivered the opinion of the court.

The United States on January 4, 1911, commenced this suit to prevent the further execution of an agreement to which the defendants were parties and which it was charged constituted the foundation of an illegal combination in violation of the Anti-Trust Act of July 2, 1890 (26 Stat. 209, c. 647). The relief asked, moreover, in the nature of things embraced certain subsidiary agreements made during the course of the execution of the main contract in further-

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ance of its alleged prohibited result. The principal agreement was made in 1908 to last until February 28, 1911, but was to continue in force thereafter from year to year unless not later than December 1st of each year a notice of the intention not to continue was given. On December 3, 1910, however, just a month before this suit was filed, the agreement in question was renewed for a period of five years.

We give from the argument on behalf of the United States a statement of the corporate defendants to the bill, some of whom had become parties to the alleged illegal combination by subsidiary agreement or agreements made at a later date than the original contract.

1. The Allan Line Steamship Company, Limited, hereafter called the "Allan Line," a British corporation, operating from Portland, Boston, and Philadelphia to London, Liverpool, and Glasgow and return.

[469] 2. International Mercantile Marine Company, a New Jersey corporation, operating from New York and Philadelphia to Liverpool and Southampton and return.

3. Its ships, together with those of its subsidiary company, defendant International Navigation Company, Limited, also operating from New York and Philadelphia to Liverpool and Southampton, * * * are referred to as the "American Line." Besides International Navigation Company, Limited, it also controls through stock ownership the defendants British and North Atlantic Steam Navigation Company, Limited, Societe Anonyme de Navigation Belge Americaine, and Oceanic Steam Navigation Company, Limited.

4. British and North Atlantic Steam Navigation Company, Limited, a British corporation, hereafter called the "Dominion Line," operating from Portland to Liverpool and return.

5. Societe Anonyme de Navigation Belge Americaine, a Belgian corporation, hereafter called the "Red Star Line," operating from New York and Philadelphia to Antwerp and return.

6. Oceanic Steam Navigation Company, Limited, a British corporation, hereafter called the "White Star Line," operating from New York and Boston to Liverpool and Southampton and return.

7. The anchor line (Henderson Brothers), Limited, a British corporation, hereafter called the "Anchor Line," operating from New York to Glasgow and return.

8. Canadian Pacific Railway Company, a Canadian corporation, operating a regular line of steamships, hereafter called the "Canadian Pacific Line," from Montreal, Quebec, and St. John in the Dominion of Canada to Liverpool, England, and return. It also owns and operates a trans-continental railroad which, partly through

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branches running into the United States and partly through connections with the Wabash and other American railroads, [470] transports a substantial proportion (12 per cent) of its steamship passengers to and from points in this country.

9. "The Cunard Steamship Company, Limited, a British corporation, hereafter called the 'Cunard Line,' operating from New York and Boston to Liverpool in England, Flume in Hungary, and Trieste in Austria, and return.

10. "Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft, a German corporation, hereafter called the 'Hamburg-American Line,' operating from New York to Hamburg and return.

11. "Nord-Deutscher Lloyd, a German corporation, hereafter called the 'North German Lloyd Line,' operating from New York, Baltimore, and Galveston to Bremen and return.

12. "Nederlandsh-Amerikaansche Stoomvaart Maatschapij (Holland-America Lijn), a Netherlands corporation, hereafter called the 'Holland-American Line,' operating between New York and Rotterdam and return.

13. "Russian East Asiatic Steamship Company, a Russian corporation, hereafter called the 'Russian-America Line,' operating between New York and Libau, Russia, and return."

The individuals named as defendants were the principal officers and agents in this country of the corporate defendants. We extract from the argument on behalf of the Government the following statement of the main provisions of the principal agreement:

"(1) The parties guarantee to each other certain definite percentages of the entire steerage traffic carried by them both eastbound and westbound between European ports and the United States and Canada, except Mediterranean passengers.

"(2) Any line exceeding its allotment must pay into the pool a compensation price of \$4 for each excess passenger, which sum is to be paid proportionately to the line or lines [471] which have not carried their full quota. It is expressly stated that this provision 'forms one of the main features of the entire contract.'

"(3) Each line must make a weekly report of the number of steerage passengers carried, and from these the secretary of the pool compiles weekly statements showing the pool position of each line. He also prepares each month provisional accounts of the compensation due from lines which have exceeded their quota. This must be paid immediately on pain of heavy penalties. Final settlements are made at the end of each year.

"(4) Each line undertakes to arrange its rates and service in such manner that the number of steerage passengers it actually carries shall correspond as nearly as possible with the number allotted to it by the contract. If any line exceeds its proportion it is in duty bound to adopt measures calculated to bring about a correct adjustment. The other lines may either await the action of the individual

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line or a majority of the lines representing 75 per cent of the pool shares can immediately order rates on a plus line to be raised, or rates on a minus line to be lowered, and from this order there is no appeal. It is expressly stated, however, that 'all parties were unanimously of the opinion that the adjustment is, whenever practicable, to be effected not by reducing the rates of one line but on the contrary by *raising* the rates of one or several of the lines.'

"(5) No line has the right to alter its steerage rates without having previously informed the secretary; i. e., all lines are bound to maintain existing rates until the other pool members are notified.

"(6) No circulars or publications shall be issued by any line reflecting upon or instituting comparisons with any other conference line unfavorable to the latter, and no party shall support (advertise in) any newspaper which shall systematically attack any conference line.

"(7) To insure the faithful performance of the agree- [472] ment, each line deposits with the secretary a promissory note in the amount of £1,000 for each per cent of traffic allotted to it in the pool. From this amount penalties may be collected ranging from £250 for smaller infractions to the forfeiture of the entire deposit if the line withdraws from the agreement before its expiration, refuses to pay compensation money, or assists directly or indirectly any opposition line.

"(8) New lines may be admitted on the terms of the agreement altered only by unanimous vote, unless otherwise provided in the contract.

"(9) To assist in the carrying out of the agreement a secretary was appointed.

"(10) Regular meetings are to be held alternately at London and Cologne for the purpose of carrying out this agreement and agreements collateral thereto. These meetings constitute what is called The Atlantic Conference.

"Representatives of the Atlantic Conference Lines likewise meet in New York in what is called the American Atlantic Conference or New York Conference."

It is to be observed in addition that the agreement expressly provided that the withdrawal of any one of the lines from the contract should release all others from all future obligation unless the others agreed among themselves to continue.

To the elucidation of the view we take of the case it suffices to say that as the result of the answers of the defendants the issues which arose for decision were twofold in character: Did the Anti-Trust Act relate to the business of ocean transportation with which the assailed agreement

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and those subsidiary to it were concerned; and if so, did the agreements and the conduct of the defendants under them constitute a violation of the provisions of the Anti-Trust Act?

The court below, although deciding that the ocean [473] transportation covered by the main agreement was under the control of the Anti-Trust Act, yet held that the assailed contract and the action of the parties under it were not within the terms of the act, and therefore that the complaint of the Government on that subject was without foundation. The court, however, concluded that a certain subsidiary agreement which had been entered into in the process of the execution of the original agreement had given rise to a practice which was reprobated by the Anti-Trust Act and the further execution of such agreement and the carrying out of the practice under it were by the decree forbidden. The court reached these conclusions upon opinions formed concerning the nature and character of ocean transportation with which the agreement was concerned, the evils which had existed in the traffic and which it was the purpose of the agreement to remedy, the practice of the commercial world in dealing with such transportation in the past, the benefit which had resulted to commerce from the execution of the agreement, the reflex light thrown upon its intent and object by the reasonable rates which had been applied in its execution, and many other conditions which had come to pass as a result of the agreement tending to the amelioration of the conditions of steerage travel and the resulting benefaction to the safety, comfort, and health of the millions of human beings traveling by steerage, to which class of traffic alone the contract related. (216 Fed. Rep. 971.)

The contentions which presumably were urged in the court below and which it is deemed by the parties here arise for decision will at once appear by giving a brief statement concerning those made on this appeal by the United States and by the defendants as appellees or on a cross appeal. On behalf of the United States it is insisted that the provisions of the Anti-Trust act govern the subject, that the terms of the agreement constitute a plain violation of that act, that the conduct of the parties under [474] it add additional force

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to the considerations arising from the text of the contract, since it demonstrates that the purpose of the agreement was to destroy competition, to acquire dominion over rates, and to fix them as the result of monopoly, and that it is wholly irrelevant to inquire whether in executing the wrongful powers which were acquired by the contract the parties were beneficent in their action, since what the act forbids is the monopoly and the combination for the purpose of obtaining monopoly, and there is no distinction in the act between a good monopoly and a bad one. On the other hand, the contentions of the defendants are as follows: First, that conceding the power, it is not to be assumed, in the absence of express declaration to that effect, that the purpose of Congress in the Anti-Trust act was to extend its authority into foreign countries to prevent the execution in such countries, of contracts which were there legal and which were intended, in view of the conditions there prevailing, to better enable the discharge by ocean carriers of their duty. Second, that it appears from subsequent legislation of Congress that it was not its intention to deal with ocean transportation from and to foreign countries by the Anti-Trust act, since such transportation was dealt with in subsequent legislation in a manner which persuasively leads to such conclusion. Tariff act of August 27, 1894, c. 349, §§ 73-77, 28 Stat. 509, 570; tariff act of July 24, 1897, c. 11, § 34, 30 Stat. 151, 213; joint resolution, September 19, 1914, No. 43, 38 Stat. 779. Third, that in fully investigating and considering the question whether ocean transportation to and from foreign countries was included in the Anti-Trust act, in an elaborate report a committee of the House of Representatives had expressed conclusions in conflict with the view that the act did apply and had recommended the adoption of legislation to guard against evils in such traffic, if any, and which legislation, if adopted, would be in a large sense incompatible with the conclusion that the Anti-Trust act was applicable to such transportation. [475]

While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demon-

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states that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality—that is, because of their now moot character as an inevitable legal consequence springing from the European war which is now flagrant—a matter of which we take judicial notice. *Montgomery v. United States*, 15 Wall. 395; *United States v. Lapène*, 17 Wall. 601; 7 Moore's International Law Digest, 244, 250. The legal proposition is not in substance controverted, but it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or re-create their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in *California v. San Pablo & Tulare R. R.*, 149 U. S. 308, 314: "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue [476] in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard."

See also *Lord v. Veazie*, 8 How. 251; *Cheong Ah May v. United States*, 113 U. S. 216; *Little v. Bowers*, 134 U. S. 547; *Jones v. Montague*, 194 U. S. 147; *Security Life Insurance Co. v. Prewitt*, 200 U. S. 446; *Richardson v. McChesney*, 218 U. S. 487; *Stearns v. Wood*, 236 U. S. 75.

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Our attention has indeed been directed to a recent decision in *United States v. Prince Line, Limited*, 220 Fed. Rep. 230, where although it was recognized that "The combination against which this proceeding is directed, composed of two British and two German steamship companies, has been practically dissolved as a result of the European war," and the questions presented "have become largely academic," the court nevertheless proceeded to consider and dispose of the case on the merits, observing in conclusion, however: "In view of the fact that the logic of events has turned this investigation into an autopsy, instead of a determination of live issues it seems unnecessary to discuss the persuasiveness of the proofs," etc. But we can not give our implied sanction to what was thus done or accept the persuasiveness of the reasoning upon which the action was based in view of the settled decisions of this court to the contrary and the fundamental principles of public policy upon which they are based. In fact at this term, although we were pressed to take jurisdiction of a cause in a capital case after the death penalty had been inflicted on the accused, we declined to do so and dismissed for want of jurisdiction because the case had become a moot one. *Director of Prisons v. Court of First Instance of the Province of Cavite*, post, p. 633.

Nor is there anything in *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, and *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. [477] 498, which conflicts with this fundamental doctrine. In the first, the *Trans-Missouri case*, a combination between railroads charged to be illegal was by consent dissolved and it was held that in view of the continued operation of the railroads and the relations between them their mere consent did not relieve of the duty to pass upon the pending charge of illegality under the statute of their previous conduct, since by the mere volition of the parties the combination could come into existence at any moment. Leaving aside some immaterial differences, in terms the ruling in the *Southern Pacific case* was based upon the decision in the *Trans-Missouri case*. Here on the contrary the business in which the parties to the combination were engaged has by force of events beyond their control ceased and by the same

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power any continued relation concerning it between them has become unlawful and impossible. The difference between this and the *Trans-Missouri case* was clearly laid down in *Mills v. Green*, 159 U. S. 651, where after announcing the general rule as to the absence of authority to consider a mere moot question and referring to possible exceptions resulting from the fact that the want of actuality had arisen either from the consent of the parties or the action of a defendant, it was declared (p. 654):

"But if the intervening event is owing to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand."

Although it thus follows that there are no issues on the merits before us which we have a right to decide, it yet remains to be determined what our order should be with reference to the decree below rendered, which as we have seen was against the Government and in favor of the assailed combination because it was found not to be within the prohibitions of the Anti-Trust act. As established by the ruling in *South Spring Hill Gold Co. v. Amador Gold Co.*, 145 U. S. 300, our conclusion on such subject must be reached without at all considering the merits of the cause [478] and must be based solely upon determining what will be "most consonant to justice" in view of the conditions and circumstances of the particular case. Coming to consider the question in that light and in view of the nature and character of the conditions which have caused the case to become moot, we are of opinion that the ends of justice exact that the judgment below should not be permitted to stand when without any fault of the Government there is no power to review it upon the merits, but that it should be reversed and the case be remanded to the court below with directions to dismiss the bill without prejudice to the right of the Government in the future to assail any actual contract or combination deemed to offend against the Anti-Trust act.

And it is so ordered.

Mr. Justice McREYNOLDS took no part in the consideration or decision of these cases.



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